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Robert and Jan Patterson

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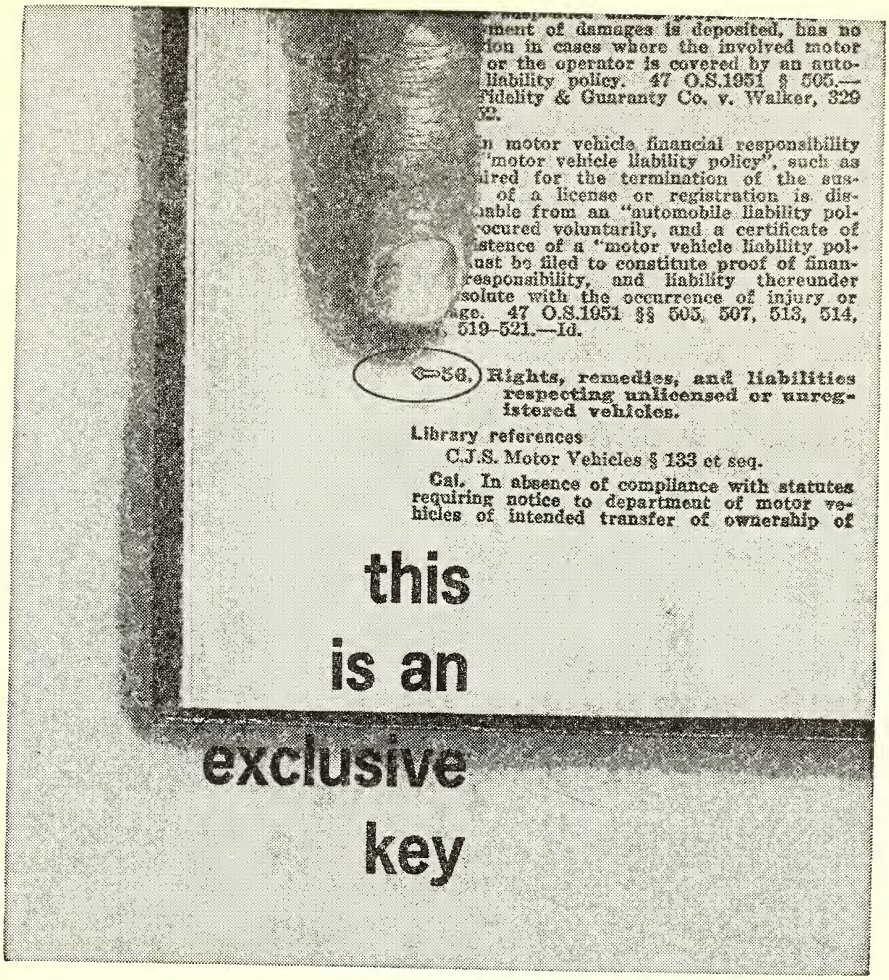

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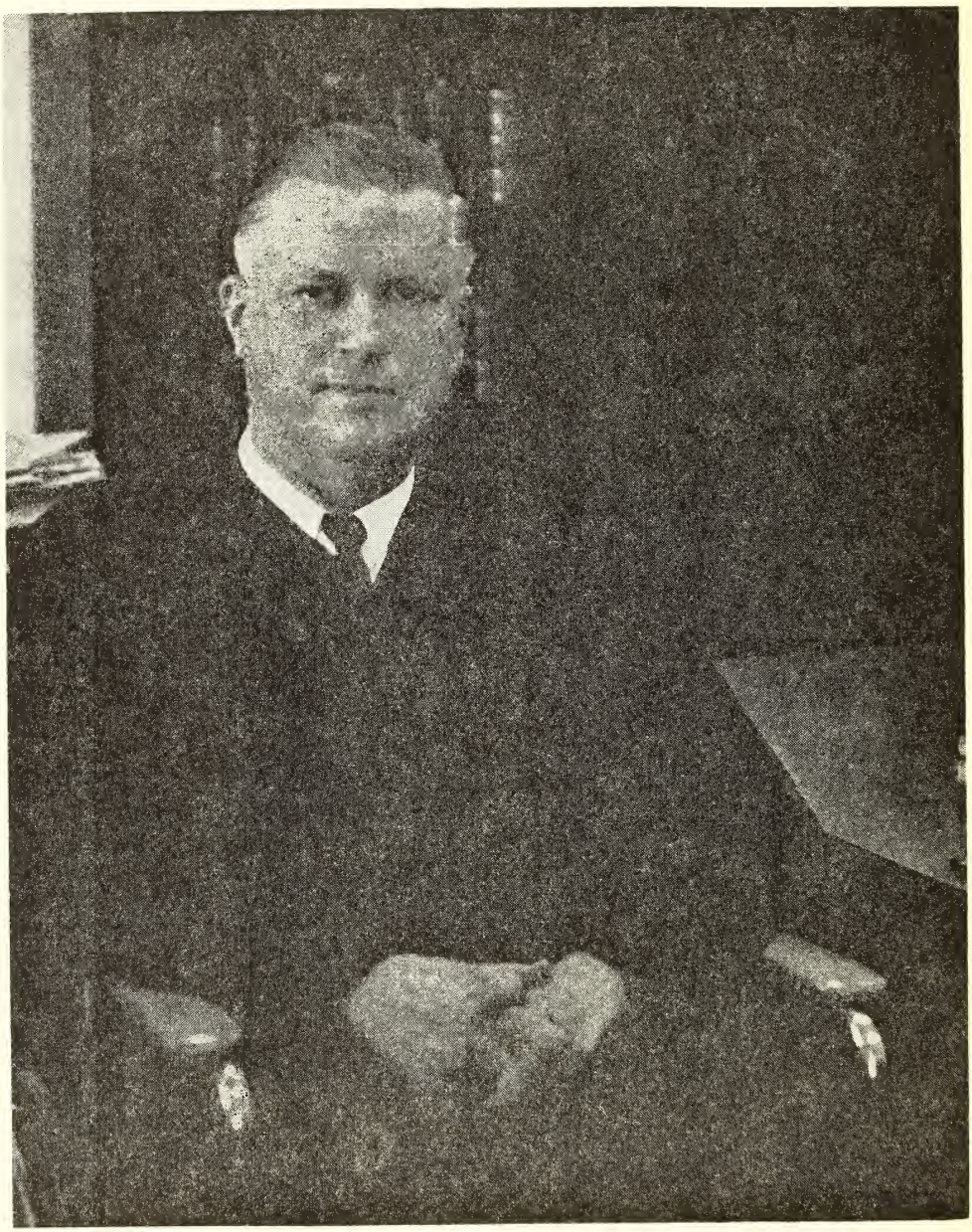

WILLIAM N. ETHRIDGE, JR.
Chief Justice
Mississippi Supreme Court

A MEMORIAL RESOLUTION OF THE HINDS COUNTY BAR ASSOCIATION*

On July 28, 1971, a most uncommon man departed this life.

It is altogether fitting and proper that this organization note his passing with appropriate solemnity and deepest sorrow. It is of more moment, however, that we note for all time to come the incomparable contribution which this uncommon man made within the short span which a divine providence allotted to him.

When his frail body finally succumbed to the ravages which had plagued it for more than forty years, this man had not only become Chief Justice of the Supreme Court of Mississippi; he had become a figure of judicial eminence whose intelligence, integrity and industry commanded national respect.

It will be a simple matter for future scholars to extract from the archives statistical data concerning this man. Our primary purpose here today, therefore, is to place of record certain matters which the archives are not likely to yield up, because only those whose lives touched his can set them down with accuracy.

But lest we appear disrespectful to statistics, we chronicle first the following:

This man was born in 1912. In 1929, at the age of 17, he graduated from high school in West Point, Mississippi. His undergraduate college career extended from 1929 to 1935, and touched both Mississippi State and Ole Miss. It was during this period that a blow fell which has caused many a less uncommon man to walk away from the fight, to capitulate and meekly to surrender to social and professional apathy. Not so with this man.

In 1935 he received his A.B. degree from the University of Mississippi. He did not then say, "I have done enough; I shall seek to prove no more." He enrolled in the law school at the University of Mississippi where he was an outstanding scholar. He received his L.L.B. there in 1937, having served as editor of the law journal from 1935 to 1937. He did not then say, "I now have a law degree; I have fought long enough; I shall rest now."

No, this uncommon man, armed only with the resolute determination and aided only by a manservant to attend his physical needs, assaulted the University of Southern California and was timely awarded a Master of Laws degree there in 1940. Since he was consigned not to be a member of the athletic teams of the great universities, he determined

* This resolution was written by Scott Tennyson, Tennyson and Britt, Jackson, Mississippi.

to become a member of the scholastic teams, and toward that end he labored with one insubstantial hand and one exceedingly brilliant mind and one absolutely indomitable spirit in 1940 and 1941 in the law school of the University of Chicago.

After he completed his post-postgraduate studies, this man of whom we speak commenced to practice law in Oxford, Mississippi. But before the sign on his office door was dry, the University Law School summoned him. There he taught until 1944 when a leading firm in Jackson persuaded him to enter again the active practice. In 1948 he returned to the University, once again to share with the students his knowledge of, enthusiasm for and dedication to the law. He remained a professor of law until October of 1950 when he was named to our Supreme Court. Subsequently, he became, and at the time of his death he was, Chief Justice of the Court.

This man did and was many other things. He was an elder in a church, a member of a social fraternity, and of several honorary fraternities and of many civic clubs. He held many offices in the structure of the local bar, the state bar and the national bar associations. He was a prodigious contributor to many legal publications, and an independent author whom legal scholars who follow after will be obliged to note with substantial respect.

But these are things that one may by research unearth today or in a hundred years.

The matters that we are here today assembled to emphasize are those things which lifted this uncommon man from the commonplace in which most of us journey.

He selected his armament early in life and wisely—unbending courage, unquestioned integrity, unending industry, an uncompromising discipline of basic human decency and an irrepressible optimism.

He also selected his enemies early and wisely—injustice, oppression, greed, tyrany, and indolence. Given the armor he chose and encasing in it a spirit that refused to surrender and a mind of the purest brilliance, and given the enemies he implacably fought, only one result could follow—a most uncommon man.

A man to whom patience, humility, understanding and compassion were automatic reflexes rather than calculated postures.

A man to whom love and devotion for his wife and children and family were so integral a part of his world that they required no prompting at all.

A man who accepted civic, religious and cultural responsibilities as welcomed occasions for service.

A man whose infectious sense of fair play extended the moral horizon of every life he touched. A man whose genuine sense of humor and warm and congenial presence created a comforting glow wherever he went.

A man whose almost eerie love for the law resulted in his maintaining a constant schedule of labor which would have been more befitting a quarry slave.

This uncommon man was named William Nathaniel Ethridge, Jr. It is our concluding thought that he had so lived that when his final summons came, he answered that summons, sustained and soothed by an unfaltering trust, and that he approached his pleasant niche in eternity as one who gathered the cloak of life about him, and, murmuring "peace," lay down to pleasant dreams.

HINDS COUNTY BAR ASSOCIATION

A PLEA FOR PROCEDURAL REFORM IN MISSISSIPPI

Robert Patterson and Jan Patterson***

It must be remembered that procedure has no value in itself; it is merely a means to a desired end—a decision on the merits.[1]

Charles Dickens painted his verbal picture of procedure in 1853:

Fog is everywhere. Fog up the river . . . fog down the river . . . . Fog on the Essex marshes, fog on the Kentish heights . . . . Fog in the eyes and throats . . . .

The raw afternoon is rawest, and the dense fog is the densest, and the muddy streets are the muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.[2]

Roscoe Pound, in his 1906 call for procedural reform, wrote:

[O]ur system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right of wrong, on the part of every sensible business man in the community.

. . . .

Our administration of justice is not decadent. It is simply behind the times.[3]

And in 1969, J. Frank underscored the alarm of many:

American civil justice has broken down; the legal system fails to perform the tasks which may be expected of it. . . .

---

* Patterson, King, Lee and Malski, Aberdeen, Miss.

** Member Editorial Board MISSISSIPPI LAW JOURNAL.

[1] Hall, *Improving the Administration of Justice*, 12 J. PUB. L. 376, 380 (1963).

[2] BLEAK HOUSE, 1, 2.

[3] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 408-16 (1906).

> [T]he collapse is now. It menaces the rights of our citizens to a determination of their disputes, and jeopardizes the capacity of commerce and industry for reasonable planning and action.
>
> [T]he curve is down; the situation is getting worse.
> [W]e have no generally accepted remedy.[4]

Early common law required strict procedural standards; the writs determined the rights. As procedure spawned substantive law, the need for such strict standards submerged. Procedure became the means toward the proper end of substantive law, the vindication of personal and property rights.

Mississippi experimented at an early date with procedural reform. In 1850 the state adopted the 1848 New York Code abolishing all forms of pleading under the common law, and substituted a complaint, and answer or demurrer. The lawyers objected. They rode circuit over poor roads to primitive courthouses. They met with their clients as court convened. They drew their pleadings in long hand. They preferred to file a short plea of the general issue and to file their special pleas later, after preparation in the more leisurely atmosphere of their offices.[5]

The Code of 1857 reinstated common law pleading.[6]

From its inception the Mississippi State Bar Association acknowledged its responsibility to foster procedural reform. The second article of its constitution indicates a purpose to:

> . . . foster legal science . . . and promote improvements in the law, and the methods of its administration.[7]

In the president's address to the bar in 1907, Honorable Murray F. Smith recognized this responsibility and proposed a unified court.[8] The bar responded slowly. Ten years later, in 1917, a "Committee of Twelve" was studying the report of the committee which had been appointed to study the president's suggestion. Twelve years after President Smith's speech, that report was still being heard with no action taken.[9]

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[4] J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM, 182 (1969).

[5] Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect*, 20 MISS. L.J. 1, 4-5 (1948).

[6] *Id.* at 6.

[7] MISS. BAR REP. 34, 35 (1907).

[8] *Id.* at 35.

[9] The report that year consisted of the statement that no committee action had been taken, that ". . . paramount world involvement . . . has absorbed, almost to the exclusion of everything else, the attention of thoughtful men." 14 MISS. BAR REP. 99 (1919).

Although procedure in chancery was modernized by the Chancery Practice Act in 1924,[10] the circuit courts still labored through the labyrinth of the common law pleas in abatement, bar and traverse. Circuit practices had not changed since 1857. At the 1934 meeting of the state Bar Association, Judge Virgil Griffith made his report on the proposed Judcial Council.[11] The committee proposed an official commission to make a thorough study of procedures in civil cases and draft rules for the simplification of pleadings. The report had been made for the two years preceding and carried over each time without action.[12] In making his report, Chairman Griffith was blunt:

> But personally I hope you will not adopt it. Why? I have been elected for a long term on the Supreme Court . . . . If you don't do this, I do not have to read all of those records. . . . I will say to you very frankly, I do not propose to read them any further . . . . Why should I wade through a whole lot of records, worry my life out reading a whole lot of stuff that nobody has disputed? Why should I read when you have a three-volume record and there is no issue on it? I am not going to do it from now on. Personally, therefore, I hope you will not do it, because it will save me a lot of labor. But as a citizen of Mississippi, who was born in Mississippi, everything I have, and everything I am as a man or anything else, is due to the people of Mississippi. As a patriotic measure, I hope this will be adopted.[13]

The report was defeated.

It was not until 1948, after repeated urgings by the bar, that the legislature passed a bill which simplified portions of circuit court pleading.[14] These reforms were virtually the same as those made by the 1850 legislature and abolished in 1857. It had taken nearly a hundred years to regain the loss.

Many other states followed the Federal Judiciary and adopted modern techniques of pleadings in the 1930's and 1940's.[15] In spite of

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[10] MISS. LAWS 1924, ch. 151.

[11] 6 MISS. L.J. 58 (1934).

[12] *Id.* at 68.

[13] *Id.* at 61.

[14] MISS. CODE ANN. § 1475.5 (1956).

[15] The states which have adopted rules substantially similar to the federal rules are: Alaska, Arizona, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Kentucky, Maine, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Puerto Rico, Utah, Washington, West Virginia and Wyoming.

Kansas, in 1963, overhauled its procedural system, adopting rules which closely follow the federal rules.

Substantial portions of the rules, usually discovery, or joinder, or both, have been

vigorous solicitation by speakers to state bar conventions,[16] Mississippi has refused to make any substantial changes in its judicial procedure. Mississippi litigants are still largely bound by the inflexible code pleading procedure of the past.

Honorable Murray F. Smith, who as president of the Mississippi State Bar Association in 1907 spoke strongly for reform, would be overwhelmed by a 1971 Mississippi law office. Gone is the dimly lit office, the pen and scroll; gone the handwritten instruments, the horse and buggy waiting to take him to the county courthouse. The electric typewriter, copying machines, dictating machines, and the ever-ringing telephone would confuse and disconcert him. He would be equally baffled by new substantive concepts of individual freedom, and governmental and corporate responsibility. He could find refuge, however, in the county courthouse at a session of the circuit court. Here, with slight briefing from a 1971 co-counsel, he could resume where he had left off in 1907. The court procedure has changed little.

There is a general public outcry for judicial reform. Inherent in this demand is the premise that the real purpose of litigation is to determine the truth. The "game concept" of a trial, with the judge as umpire, has long since departed the public favor.[17] Lawyers, as well as laymen, have rejected the concept of procedure for procedure's sake,[18] and demand that a trial answer the question: "What do substantive law and justice require?"[19]

Current problems of many federal and state courts stem from grossly overcrowded dockets, resulting in substantial delays in trial.[20]

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adopted by Alabama, Arkansas, California, Connecticut, Illinois, Louisiana, New York and Ohio.

Florida, Iowa, Missouri, Pennsylvania and Texas have been stimulated by the federal rules to completely revise their procedure. Massachusetts is in the process of revision. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICES AND PROCEDURE § 9, § 9-953 (Wright ed. Vol. 1. Cum. Supp. 1971) [hereinafter cited as BARRON & HOLTZOFF].

[16] Carter, *Civil Rules of Practice and Procedure*, 37 MISS. L.J. 539 (1966).

[17] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 405 (1906) [hereinafter cited as Pound].

[18] The very first case assigned to me after I was appointed to the Court of Appeals was subject to being dismissed on a very technical point. I even drafted an opinion with detailed precedents dismissing the writ of error. I then asked myself, "Is this really why you became an appellate judge?" I remembered how as an attorney and academic I had criticized the courts for doing this very thing. I tore it up and wrote an opinion on the merits. I shudder to think of what my record would have been over these past nine years if I had not torn up that opinion. As it was, I had made a philosophical decision to reject legal mechanics and follow the path of legal realism. Hall, *Civil Procedure—What's it all about?* 21 MERCER L. REV. 377 (1970).

[19] Pound, *supra* note 17, at 406.

[20] Today the average waiting period for personal injury suits in civil courts

Current Mississippi judicial problems still revolve around our antiquated procedure. Whatever the cause of the need for judicial reform, when courts lose their efficiency, the people, as well as the lawyers, suffer. The adoption of the Federal Rules of Civil Procedure would represent, not efficiency for efficiency's sake, but a commitment to values higher than pure efficiency—the value of the rights of the individual.

There are three gaping voids in modern Mississippi procedure which would be filled by the adoption of the federal rules: (1) notice pleadings, (2) discovery, and (3) third party practice. The purpose of this article is to discuss, to compare, to advocate the modernization of Mississippi practice, pleadings and procedures within the context of these three areas.

I. Pleading

> [B]ased on experience at common law and under the codes . . . pleadings are not of great importance in a lawsuit.[21]

"Historically pleading has had four functions: (1) giving notice of the nature of a claim on defense; (2) stating the facts each party believes to exist; (3) narrowing the issues; and (4) providing a means for speedy disposition of sham claims and unsubstantial defenses."[22] Common law pleading was designed to narrow, narrow, narrow until one issue, the product of a single set of facts, remained to be decided. This was accomplished by the defendant's traverse, plea in confession and avoidance, and the plaintiff's subsequent replication, to which the defendant filed a rejoinder. The plaintiff took his turn again with his surrejoinder, to which the defendant replied with a rebutter, which called for the plaintiff's surrebutter, and on *ad infinitum*.[23]

> in major metropolitan areas is twenty-one months and in counties having a population of more than 750,000, exceeds twenty-nine months . . . . I am deeply concerned with preserving the autonomy and vigor of state and local courts, and I deplore the intrusion of the Federal Government into the domain of state government. It has long been my opinion that the primary reason the Federal Government has moved into many areas that have been exclusively within the province of the states is that the states, generally speaking, have not been sensitive to the demands of today's society and have failed to meet modern needs with modern government.
> Tydings, *Improving Archaic Judicial Machinery*, 57 A.B.A.J. 154, 155-56 (Feb. 1971).

[21] C. Wright, Law of Federal Courts, 273 (2d ed. 1970) [hereinafter cited as Wright].

[22] *Id.* at 283.

[23] Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect*, 20 Miss. L.J. 1, 10 (1948).

> The object is to get an effective way to accomplish what? What do you do in law? You file a declaration; he files a plea of the general issue. He denies everything that is stated in the declaration, even to the venue. What do you have to do? You have to prove everything from the beginning to the end.

Code pleading, pioneered by the New York Code in 1848, moved from single issue determination to fact determination. Theoretically the outdated, cumbersome pleadings were extinct and procedure was greatly simplified. In practice, however, the emphasis under the code has been on pleading ultimate facts rather than evidentiary facts or conclusions, even though the distinctions among the three are blurred and the search for an ultimate fact illusory. The Mississippi pleader, then, is faced with the dilemma of pleading with sparcity and being subject to demurrer, or pleading adequately and being irrevocably bound at trial by his pleading. The logical solution has been to accept neither unacceptable alternative, but to plead with verbose verbiage, including every possible allegation.

Mississippi cannot be strictly classified as a code state because separate chancery and circuit courts are retained. Common law pleading rules have not been entirely abrogated; therefore, pleading in Mississippi still contains many unnecessary pitfalls and hindrances. In spite of the deceptively simple code section defining a declaration,[24] there are

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> Is falsity in pleading any more to be justified than lying in personal life? Have I any right to lie to the judge about a case? No. We do it every day in pleading. When you file a plea of the general issues, you lie from beginning to end. Who ever heard a lawyer advocating the proposition and standing by it today, we are going to come into court and lie from beginning to end? *Id.* at 11.

JOSEPH G. BALDWIN, a noted lawyer in the 1850's collected sketches entitled FLUSH TIMES OF ALABAMA AND MISSISSIPPI (1853) in which he depicts the difficulties encountered by the young members of the bar in circuit practice:

> But the perils of the road from the writ to an issue or issues—for there were generally several of them—were great indeed. The way was infested and ambushed, with all imaginable points of practice quirks and quibbles. . . . *Id.* at 52. [W]e had to run a gauntlet of technicalities and quibbles to get a judgment on a 'plain note of hand' . . . . The leaders were sharp fellows—keen as briars—au fait to all trap points—quick to discern small errors—perfect in forms and ceremonies . . . the idea that justice had anything to do with trying causes . . . never seemed to occur to them once, as a possible conception. . . . He had accomplished himself in the elegant science of special pleading, had learned all the arts of confusing a case by all manner of pleas and motions, and took as much interest in enveloping a plain suit in all the cobwebs of technical defence as Vidocq ever took in laying snare for a rogue. He could 'entangle justice in such a web of law,' that the blind hussy could have never found her way out again if Theseus had been there to give her the clew. His thought by day and his meditation by night was special pleas . . . . He could draw a volume of pleas a night, each one so nearly presenting a regular defence, that there was scarcely any telling whether it hit it or not. . . . [He threw] the boys right and left as fast as they came to him, by pleas dilatory, sham and meritorious, demurrers, motions and variances. *Id.* at 61-62.

[24] MISS. CODE ANN. § 1464 (1942) brought forward from 1848 Hutchinson's Code, ch. 61, art. 1: "The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contains sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different."

many requirements which may not be ignored. One such requirement is that the pleader must state facts, not conclusions. For example, a Mr. Horton filed his complaint alleging that he was the owner of a cow which he was required to dip in order to eradicate ticks, that the cow drank some of the liquid due to the carelessness of the inspector. The court held that "the declaration does not charge any fact from which incompetency or neglect can legally be determined."[25] The pleader stated a conclusion, not a fact.

In *King v. Mississippi Power and Light Co.*,[26] the plaintiff alleged all of the facts leading up to the electrocution of his cattle by a fallen power line, and the subsequent failure of the company to cut off the power so he could immediately remove the cows to prepare them for food purposes. A delay of two hours resulted in a complete loss of the cattle for any purpose. His declaration was insufficient. He failed to allege facts regarding the installation, maintenance and repair of the line. "[T]he pleading will be construed most strongly against the pleader;"[27] therefore, the general allegation of negligence failed. Facts must be pleaded showing actionable negligence.

Not only must the declaration meet all requirements to adequately state a cause of action, a copy of any writing on which suit is based must be attached and filed with the declaration.[28] If there is a conflict between the declaration and the exhibit, the latter prevails.[29]

By statute, the pleadings are of utmost importance in Mississippi in delineating the permissible bounds of evidence to be introduced at trial.[30] If there is a material variance between the pleadings and the evidence, and if objection is made at trial, the error is fatal. The judgment will be reversed by the Mississippi Supreme Court.[31] In *Mississippi State Highway Comm. v. Rhymes*,[32] the plaintiff alleged that the usefulness of an alley as a means of access had been destroyed by the

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[25] Horton v. Lincoln Co., 116 Miss. 813, 821, 77 So. 796, 797 (1918).

[26] 244 Miss. 486, 142 So. 2d 222 (1962).

[27] *Id.* at 493, 142 So. 2d at 225. Curtis v. Mississippi State Highway Comm'n, 195 So. 2d 497, 500 (Miss. 1967).

[28] MISS. CODE ANN. § 1469-70 (1942); Motors Insurance Corp. v. Holland, 229 Miss. 262, 90 So. 2d 392 (1956).

[29] North American Life Insurance Co. v. Smith, 178 Miss. 238, 172 So. 135 (1937).

[30] A variance between the allegation in a pleading and the proof shall not be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; and where it shall not be shown to the satisfaction of the court that the party has been so misled, and immediate amendment of the pleading may be made without costs, and without delaying the cause. If the party has been so actually misled, an amendment may be allowed on such terms as shall be just.

[31] Alexander Pool Co. v. Pevey, 247 Miss. 389, 152 So. 2d 451 (1963).

[32] 248 Miss. 468, 160 So. 2d 197 (1964).

construction of an embankment at one end. When the plaintiff sought to introduce evidence of damage because of flooding and drainage, the defendant objected. The Supreme Court ruled the objection valid, that the variance was material, thus fatal. "Not one word or allegation was contained in such declaration to the effect that he sought recovery by way of the depreciation of his property as a result of improper drainage."[33] The cause was reversed and remanded to allow the plaintiff to plead again.

There is another major pitfall in Mississippi pleading. Sometimes referred to as election,[34] the prohibition against suing in contract and in tort in the same suit is a carry-over from common law rules. In spite of the wording of the statute that forms of action have been abolished, the Supreme Court clings to the "theory of the case" requirement. The 1904 decision in *Town of Hazlehurst v. Cumberland Telephone & Telegraph Co.*[35] states simply and emphatically that a count in an action *ex contractu* may not be joined in the same declaration with an action *ex delicto*. This concept appears to remain viable. *Hazlehurst* was cited with approval in 1930, 1941, 1958 and was distinguished, still with approval, in 1964.[36]

Equally fatal is the error of putting two "antagonistic" causes of action in one count. In a suit involving one plaintiff, one defendant, and one injury, the plaintiff charged the defendant with negligence for failure to furnish a safe place to work, as well as the negligence of a fellow servant. The error caused the court to reverse and remand.[37]

Requirements for a valid federal court complaint are not so restrictive. Rule 8(a) (2), 8(e) (1) and 8(f) of the Federal Rules of Civil Procedure, the "keystone of the system of procedure embodied in the rules,"[38] provide:

> 8(a). A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . . 8(e)(1). Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. 8(f). All pleadings shall be so construed as to do substantial justice.

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[33] *Id.* at 474, 160 So. 2d at 200.

[34] Home Insurance Co. v. Tate Mercantile Co., 117 Miss. 760, 78 So. 709 (1918).

[35] 83 Miss. 303, 35 So. 951 (1904).

[36] Hazell Mach. Co. v. Shahan, 249 Miss. 301, 161 So. 2d 618 (1964); Stringer v. Consumer's Credit Corp., 234 Miss. 240, 105 So. 2d 756 (1958); Gulf. M. & N. R. R. v. Madden, 190 Miss. 374, 200 So. 119 (1941); Hall v. Stokely, 156 Miss. 673, 126 So. 475 (1930).

[37] Illinois Cent. R. R. v. Abrams, 84 Miss. 456, 36 So. 542 (1904).

[38] WRIGHT, *supra* note 21, at 282.

Pleadings under these rules perform the function required of pleadings without burdening them with impossible tasks. No distinction is drawn between evidence, ultimate facts and conclusions. No choice need be made regarding the theory of the case. The pleadings may allege matters alternatively, hypothetically, even inconsistently; all claims and defenses are considered by the court. The pleadings, not construed most strongly against the pleader, are construed as substantial justice requires. Once the case is heard, the pleadings are no longer significant. The judgment is in accordance with the evidence; the evidence is not irrevocably linked to the pleadings. A complaint may not be dismissed unless it appears certain that no relief can be granted under any set of facts that can be proved in support of its allegations. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleadings is to facilitate a proper decision on the merits."[39]

The rules governing answers in Mississippi courts contain their own built-in roadblock to decisions on the merits.

Section 1475.5,[40] passed in 1948, abolished pleas and allows the circuit court defendant to include these defenses in his answer as affirmative matter, thus bringing the circuit pratice into conformity with the chancery practice.[41] Prior to 1952, two separate trials might be required to adjust the differences if each of two persons asserted a claim against the other. Even so, the statute[42] as interpreted allows the counterclaim only in certain situations. For example, in *Carruth v. Easterling*,[43] the plaintiff sought to replevin his cows which had wandered into his neighbor's field. The defendant filed a counterclaim for damage due to the trespass of the cows in his cornfield and the feed furnished them while they were impounded. The counterclaim was struck. The court explained: "We are drawn to this conclusion because a replevin action is a possessory action for specific property, rather than a suit for monetary damages."[44] The court held that the defendant may not plead a counterclaim in replevin actions in spite of the counterclaim statute. The counterclaim was considered an unrelated demand; the defendant could revert to the common law remedy and allege facts amounting to recoupment, but not facts "which amount to a counterclaim to set off or establish unrelated debts or demands."[45]

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[39] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[40] Miss. Laws of 1948, ch. 230 § 1-6.

[41] Miss. Code Ann. § 1290-91 (1942).

[42] Miss. Code Ann. § 1483.5 (1956).

[43] 247 Miss. 364, 150 So. 2d 852 (1963).

[44] *Id.* at 376, 150 So. 2d at 858.

[45] *Id.*

Under the statute, the counterclaim is permissive only, never compulsory. Circuit procedure does not yet allow a defendant to cross claim against a co-defendant. Any cross claim necessitates a separate lawsuit.

In chancery, a defendant may make his answer a cross bill against the complainant, or his co-defendant or defendants, or all of them, and may introduce new matter material to his defense.[46] The decisions, again, strictly construe this provision by narrowly limiting the new matter which may be properly introduced.[47]

In contrast, Rule 13 of the Federal Rules of Civil Procedure allows a counterclaim which may be legal or equitable, in contract or in tort, one which has little connection with the plaintiff's claim. In order to prevent a multiplicity of suits, a counterclaim is compulsory if:

(1) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim;

(2) it is owned by the pleader at the time he serves his pleadings;[48]

(3) no third parties are required of whom the court cannot acquire personal jurisdiction;

(4) it is not the subject matter of another pending action at the time the original suit was commenced.

Any claim that a person has against an opposing party other than that which the rules denominate compulsory may be pleaded as a permissive counterclaim.[49]

Unlike the chancery rule on cross claims, Federal Rule 13 (g) uses the term cross claim to apply only to a claim against a co-party. It is appropriate when the claim is related to the subject matter of the original action or the property involved therein. The cross claim is not mandatory, and is used primarily in contribution, and indemnity by one secondarily liable against one primarily liable.[50] There is no comparable Mississippi relief in circuit court.

Experience has shown that common law pleading and code pleading are expensive, inflexible and time consuming. These methods demand

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[46] MISS. CODE ANN. § 1296 (1942).

[47] Re Will of McGough, 222 So. 2d 673 (Miss. 1969). In a proceeding to admit a will to probate, a cross-bill seeking an order requiring a named beneficiary to turn over to the executor property allegedly belonging to the estate, was held properly dismissed as not germane to the original petition. MISS. CODE ANN. § 375, 384 (1942).

[48] Cold Metal Process Co. v. United Engineering & Foundry Co., 190 F.2d 217 (3d Cir. 1951); 1A BARRON & HOLTZOFF § 393, at 56, 62.

[49] WRIGHT, *supra* note 21, at 349; Union Paving Co. v. Downer Corp., 276 F. 2d 468 (9th Cir. 1960).

[50] WRIGHT, *supra* note 21, at 352.

more of pleading than the pleading is capable of producing. Pleadings are ideally suited to give notice; there are better techniques for arriving at the facts and issues. Pleadings should be a "generalized summary of the party's position, sufficient to advise the party for which incident he is being sued. . . ."[51]

Under the Federal Rules of Civil Procedure, proper pleading is not a goal in itself. It is not given priority over the meritorious claim which is improperly pleaded. The goal is "to secure a determination on the merits rather than to penalize litigants because of procedural blunders."[52] This type pleading, if enacted in a vacuum, would work injustice rather than justice. The efficacy of the notice pleading must be viewed along with the techniques of discovery, which reveal the facts and the issues, and the motion for summary judgment,[53] which speedily disposes of cases in which there is no merit.

II. Discovery

Discovery is the sine qua non of notice pleading under the Federal Rules. It has been noted above that pleadings never were the ideal vehicle for the interchange of information in a law suit. Limited discovery procedures were developed at common law[54] and later code practice[55] to bolster the pleadings as an informational device.

Notice pleading called for a completely new concept. The rules transformed discovery into the principal disclosure tool of federal practice, designed so that "either party may compel the other to disgorge whatever facts he has in his possession."[56]

The compulsion is effected by four devices: depositions,[57] interrogatories to parties,[58] physical examination of person and property[59] and requests for admissions.[60] The rules are interlocked by Rule 26; sanctions are imposed under Rule 37.

All of these devices are aimed at fully apprising court and counsel of all the facts and the full scope of the issues before trial. They are

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[51] *Id.* at 283.

[52] *Id.* at 288.

[53] Fed. R. Civ. P. 56 (d) [hereinafter referred to as Rule].

[54] Minder v. Georgia, 183 U.S. 559 (1901).

[55] However, it appears that discovery procedure was more exhaustive in Mississippi in earlier years than at present. *See, e.g.*, Miss. Code Ann. § 783 and § 788-803 (1942).

[56] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[57] Rule 30-32.

[58] Rule 33.

[59] Rule 34 and 35.

[60] Rule 36.

complementary; the use of one device does not restrict the use of another.[61] Their avowed purpose calls for a liberal construction,[62] and the federal courts have readily complied.[63]

Mississippi practice does not permit "discovery" as contemplated in the Federal Rules. Federal discovery reaches for *information*. In general, its only requirement is relevance. Mississippi discovery is aimed at obtaining *evidence*. The parties must still look to the pleadings for their exchange of information.

Interrogatories,[64] depositions,[65] subpoenaes duces tecum,[66] and bills of particulars[67] are available in Mississippi circuit courts. Bills for accounting[68] and discovery,[69] along with the circuit discovery tools are available in chancery. However, each of these is strictly circumscribed by statute, and judicial decisions have further proscribed that efficient use.

The difference between the two systems prohibits any true comparison. Nevertheless, parallel discussions are revealing.

A. *Depositions*

Mississippi statutes permit the oral deposition of all non-resident

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[61] "The Sections are complementary to one another and the use of one does not restrict the further use of the other on the same subject matter. The various sections may be used independently, simultaneously or consecutively as required." V. O. Machinoimport v. Clark Equip. Co., 11 F.R.D. 55, 60 (S.D.N.Y. 1951).

[62] Rule 26(b)(1): Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[63] "The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[64] MISS. CODE ANN. § 1712 (1956).

[65] MISS. CODE ANN. § 1699 (1942).

[66] MISS. CODE ANN. § 1658 (1956).

[67] MISS. CODE ANN. § 1499 (1942). The court must be satisfied by affidavit that it is necessary that the adversary be more specific. The bill of particulars is then ordered by the court.

[68] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 24 (2d ed. 1950) [hereinafter cited as GRIFFITH].

[69] MISS. CODE ANN. § 1284 (1942).

witnesses,[70] and certain limited classes of resident witnesses.[71] The governing statutes refer to witnesses, as opposed to parties, although the statutes appear to use the words "interrogatories" and "depositions" interchangeably at times.[72]

In the case of non-residents, interrogatories are filed with the clerk, notice issued and a commissioner appointed to examine the witness. Cross-interrogatories may be filed, or the adverse attorney may attend and cross-examine in person. Only then does the statute state that the requesting party may orally examine the witness in rebuttal.[73]

In the case of a resident witness subject to deposition, affidavit must be made stating the need for the deposition and clearly stating that the witness is material.[74] The deposition may be taken before anyone authorized to administer oaths or any official court reporter, on ten days' notice.[75] Although the deposition is intended for use as evidence at trial,[76] opposing counsel may make affidavit no later than ten days before trial that in his opinion an oral examination in open court is necessary.

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[70] MISS. CODE ANN. § 1703 (1956). Prior to 1936, non-resident witnesses could not be deposed. Mississippi Valley Trust Co. v. Brewer, 157 Miss. 890, 128 So. 83 (1930).

[71] MISS. CODE ANN. § 1699 (1956): (1) persons about to depart from the state, (2) Persons who shall be unable, or likely to be unable, to attend the court, (3) "when the claim or defense, or a material point thereof, shall depend on the testimony of a single witness," (4) judges of the supreme, circuit or chancery courts, [or any other officer of the government or the state or the United States, who on account of official duties, cannot conveniently attend the court], (5) clerks of courts of record, sheriffs or justices of the peace outside of the county where the trial is to be held, (6) any female, (7) persons residing more than sixty miles from the place of trial and (8) any physician.

[72] MISS. CODE ANN. § 1699 (1956) *et seq*. Hartford Fire Insurance Co. v. Green, 52 Miss. 332 (1876), ruled that depositions of parties may be taken the same as of other witnesses.

[73] F. EVERETT, JR., *Motions and Discovery Procedures*, CIRCUIT COURT PRACTICE, 97, 114-15 (M. L. I. 1966).

[74] MISS. CODE ANN. § 1700 (1956). The affidavit is essential if the deposition is to be read into evidence. Ragan v. Cargill, 24 Miss. 540 (1852).

[75] MISS. CODE ANN. § 1701 (1956), as amended. Since the statute reads that the deposition may be taken before "any officer. . . . ," it would seem to indicate that written interrogatories "need not be filed when the deposition is to be taken within the state, and that the examination may be verbally or in writing." F. EVERETT, JR., *Motions and Discovery Procedures*, CIRCUIT COURT PRACTICE 97, 116 (M. L. I. 1966).

[76] MISS CODE ANN. § 1700 (1956). MISS CODE ANN. § 1708 (1956): ". . . A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition, or any part thereof, for any purpose other than that of contradicting or impeaching the deponent shall make the dependent the witness of the party introducing the deposition (unless the deposition be that of an adverse party). . . ."

In such event, the deposition will not be allowed unless the deponent is disabled due to permanent sickness, physical injury or old age.[77]

The Federal Rules permit depositions to be either oral[78] or upon written questions.[79] In either case, any person, including a party, may be deposed at any time after commencement of the action.[80] Ordinarily, a party need not obtain leave of court in order to depose.[81] If a plaintiff wishes to depose within thirty days after service of summons and complaint, he must obtain leave of court unless the defendant has begun discovery procedures or unless the person to be deposed is about to become unavailable for depositions because of certain specified reasons.[82]

Under Rule 30(b)(1), a party desiring to take the oral deposition of any person must give "reasonable notice in writing"[83] to the other parties to the action, telling them of the time and place of deposition and the person to be examined. Rule 30 (a) provides that the witness may be compelled to attend by subpoena under Rule 45.[84] A person being deposed may resort to the court for protection if he feels that an examination is being conducted in bad faith or that he is being harrassed.[85] Unless waived, the witness must sign the deposition after transcription; it must be certified by the officer taking the same, then filed with the court, along with the exhibits.[86]

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[77] MISS. CODE ANN. § 1711 (1942). This section was held to be inapplicable to non-resident witnesses. Milner Products Co. v. Salitan, 215 Miss. 459, 61 So. 2d 303 (1952).

[78] RULE 30.

[79] RULE 31.

[80] Rule 30(b)(6), added to the rules in 1970, permits the party seeking discovery of a corporation to name the corporation as the deponent. The corporation must then designate its personnel who will submit to the deposition.

[81] As far as possible, the federal discovery rules are designed to relieve the court of the mechanics of discovery. The rules generally place the burden on opposing counsel to deal directly with each other concerning discovery matters. They resort to the court only in exceptional situations or when they cannot agree.

[82] RULE 30(a)(1) and (2).

[83] What amounts to "reasonable" notice seems to depend on the circumstances. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2111 (1960) [hereinafter cited as WRIGHT & MILLER]. The court may adjust the time under Rule 30(b)(3), or enter a protective order under Rule 26(c)(3).

[84] A party need not be subpoenaed to the taking of his own deposition by his adversary. If he is properly noticed and fails to appear, his pleadings may be stricken and judgment by default rendered against him, Bourne, Inc. v. Romero, 23 F.R.D. 292 (E.D. La. 1957), or his complaint dismissed. Independent Productions Corp. v. Loew's, 24 F.R.D. 360 (S.D.N.Y. 1959).

[85] RULE 30 (d).

[86] Rule 30(b)(5) provides that a party deponent may be noticed under Rule 34 to produce documents or other tangible things for inspection and copying at the deposition. A witness not a party may be required to do likewise by use of a subpoena duces tecum under Rule 45(d)(1).

Rules 30(g)(1) and (2) ensure cooperation of counsel without court supervision. The former says that if a party gives notice of the taking of depositions and does not appear, he is liable for expenses and attorney's fees of any other party who attends pursuant to the notice. The latter provides that any party who gives notice of the taking of deposition, but fails to subpoena the witness, is liable for the expenses and attorney's fees of any party who attends in expectation of the taking of the depositions, if in fact the witness does not appear.

A deposition may be taken on written questions after proper notice. In the event such procedure is commenced, the rule provides for cross-questions, redirect questions and recross questions, all in writing.[87]

At trial, or in interlocutory proceedings, depositions may be used by any party to contradict or impeach[88] and may be used for any purpose under certain conditions.[89] Generally speaking, a party may object to the use of a deposition at trial or hearing for any reason which would exclude the testimony if offered by the witness in person.[90] A party does not make a person his own witness for any purpose by taking his deposition, but if he introduces the deposition of any person other than a party for any purpose except contradiction or impeachment, he thereby makes the deponent his witness.[91]

B. Interrogatories to Parties

Under Mississippi practice, interrogatories are circumscribed by procedure, in scope and in use. Severe sanctions attach to non-compliance with procedural requirements.[92] Interrogatories may only be propounded to parties, and the supreme court has held that the statute was intended to "enable resident parties to a suit to take the evidence of a non resident

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[87] RULE 31 (a).

[88] RULE 32(a)(1).

[89] Rule 32(a)(3) provides that a deposition may be used by any party for any purpose if the witness dies, or is more than 100 miles from the place of trial or hearing, or is unable to attend because of age, illness, infirmity or imprisonment, or is not subject to subpoena, or if the use of the deposition is required "in the interest of justice" because of "exceptional circumstances."

[90] RULE 32 (b).

[91] RULE 32 (c).

[92] MISS. CODE ANN. § 1712 (1956).

> If the testimony of a party to the suit be desired by the adverse party, interrogatories to him may be filed in the clerk's office, and a copy thereof, with notice of filing, shall be given the party, or his attorney or solicitor; and if he fails to answer such interrogatories within thirty (30) days after service thereof, or within such further time as the court, for good cause shown, may allow, his plea shall be dismissed, if he be plaintiff or complainant, and if he be defendant his plea or answer may be taken off the file and judgment by default entered, or the bill be taken as confessed.

party for use in the suit. It was not intended to enable the resident party to explore all of the business affairs of the adversary."[93] The subject matter of interrogatories is limited to that which is pertinent, relevant, and admissible to establish a particular claim.[94]

Interrogatories must be filed in the clerk's office with a copy and notice given to the adverse party. The notice is formal notice governed by Section 1876,[95] which may be waived.[96] Answer must be made within thirty days of service, or within such time as the court within its discretion allows for "good cause shown." Failure to comply results in a dismissal, default judgment or decree pro confesso.[97] Because of the severity of the sanctions, the court has sought ways to circumvent literal enforcement of the statute. In *Williams v. Whitfield*,[98] the plaintiff was allowed to non-suit[99] on showing that the failure to answer was the fault of the attorney, not the client. In *Peoples Bank v. D'Lo Royalties, Inc.*,[100] counsel for each side had previously agreed on delays; therefore, the lower court's dismissal for failure to answer interrogatories was reversed. Counsel had waived his right to complain.

The proper challenge to interrogatories propounded in Mississippi courts is a motion to suppress, or an exception because the interrogatories exceed statutory requirements.[101] The Supreme Court will not consider an exception unless the record shows that the lower court has passed upon the motion to suppress.[102]

Interrogatories may be used as testimony in the trial. Failure to introduce interrogatories by the propounding party permits the answering party to put them into evidence in the same manner as a deposition.[103]

The scope of interrogatories under the Federal Rules is as broad

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[93] Morrison v. Guaranty Mortgage & Trust Co., 191 Miss. 207, 227, 199 So. 110, 115 (1941).

[94] *Id.*

[95] MISS. CODE ANN. (1942).

[96] Merchants' Grocery Co. v. Merchants' Trust & Banking Co., 119 Miss. 99, 80 So. 494 (1919).

[97] Williams v. Whitfield, 249 Miss. 634, 163 So. 2d 688 (1964). § 1712 was amended in 1956 to add "for good cause shown" to alleviate the harshness of the rule.

[98] 249 Miss. 634, 163 So. 2d 688 (1964).

[99] MISS. CODE ANN. § 1538 (1942).

[100] 206 So. 2d 836 (Miss. 1968).

[101] Morrison v. Guaranty Mortgage & Trust Co., 191 Miss. 207, 199 So. 110 (1941); MISS. CODE ANN. § 1709 (1942).

[102] Jones v. Loggins, 37 Miss. 546 (1859).

[103] Standard Life & Accident Ins. Co. v. Tinney, 73 Miss. 726, 19 So. 662 (1896), in which the court held that the procedure is in the nature of a deposition; therefore answers should be subscribed and sworn.

as under federal discovery generally.[104] As is true under Mississippi law, interrogatories may only be propounded to parties.[105]

In federal court, interrogatories are an effective and inexpensive means of obtaining a multitude of simple facts. Being restricted only as to relevancy, they are especially useful in obtaining information on which to form a foundation for the later taking of a more searching oral deposition. They are also effective in obtaining statistical information in complicated actions.[106]

A party interrogated as to information contained in his business records may simply make the records available and let the interrogating party search out his own information.[107] However, Rule 33 cannot be used to require the production of documents.[108]

The question of whether interrogatories under Rule 33 could evoke opinions and contentions of parties formerly provoked a wide diversity of opinion.[109] A 1970 amendment attempted to solve, or at least to ameliorate, the problem by specifically providing that an interrogatory is not "necessarily objectionable" merely because is requires an opinion or a contention.[110] Such interrogatories may, however, be abated by court order until other discovery is completed.[111]

Since the subject matter of interrogatories under Mississippi law is restricted to matters admissible in evidence, opinions and contentions of parties have no place in interrogatories propounded in Mississippi courts.[112]

C. *Physical and Mental Examination of Parties*

At least two-thirds of the states, including Mississippi,[113] still

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[104] RULE 33 (b).

[105] MISS. CODE ANN. § 1712 (1956).

[106] For illustration of the broad permissible limits of interrogatories under the Federal Rules, see Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th cir. 1970).

[107] RULE 33 (c).

[108] WRIGHT & MILLER § 2166, at 492-97.

[109] *Id.* § 2167, at 497.

[110] RULE 33 (b).

[111] The Advisory Committee explains its position as follows:

> Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit factual opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery .... On the other hand, under the new language interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case. Advisory Committee's Note to 1970 Amendment of Rule 33 (b), 48 F.R.D. 524 (1970).

[112] Morrison v. Guaranty & Trust Co., 191 Miss. 207, 199 So. 110 (1941).

[113] MISS. CODE ANN. § 1697 (Supp. 1970).

recognize the principle that communication between physician and patient is privileged in a civil action;[114] however, only three states still refuse to permit court ordered physical and mental examination of a party to such an action.[115] Mississippi is one of these.[116]

The Mississippi Supreme Court has long recognized the possibilities of abuse that lie within the privilege statute.[117] It has held that voluntary testimony concerning the nature of injuries in a civil case constitutes a waiver of the privilege,[118] and that for the privilege to exist, the physician-patient communciation must be in a professional context with the purpose of treatment.[119] Thus, although hampered by the absence of any statute or rule authorizing court ordered examinations in a civil case, the Mississippi courts nevertheless turn toward the principles typified by Federal Rule 35.[120]

The federal rule requires "good cause" before such an examination may be taken, and unlike other discovery devices, requires a motion and order.[121] Traditional concern over the invasion of the privacy and person of another accounts for the more rigid requirements of this rule.[122]

The rule encourages the exchange of information between the party

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[114] 8 WIGMORE ON EVIDENCE § 2380, at 820 (McNaughton ed. 1961).

[115] WRIGHT & MILLER § 2331, at 665-66.

[116] *Id.* at 666.

[117] But it is the duty of courts, as time progresses, to closely observe the uses to which any procedural rule, whether of the common law or of the statutes, has been put, and to so control those uses that while the terms of the rule or statute shall be fairly fulfilled, it shall be put to no use for the ends of injustice, or to the defeat of real justice, when such use can at least be minimized by resort to other established procedural rules, and when such resort works no intrusion upon that which is essentially fundamental in the judicial process or in the preservation of the foundations of society itself.

Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 273, 192 So. 577, 579, 131 A.L.R. 684 (1940).

[118] Dennis v. Prisock, 254 Miss. 574, 181 So. 2d 125 (1965).

[119] This is the rationale behind the cases holding that the testimony of a court appointed physician in a criminal case is not within the privilege. *See, e.g.*, Norwood v. State, 158 Miss. 550, 130 So. 733 (1930).

[120] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 170 So. 686 (1936). For an excellent analysis of Mississippi law on this point, *see* Hardy v. Riscy, 309 F. Supp. 1234 (N.D. Miss. 1970).

[121] Rule 35(a). These requirements are more than "a mere formality," but in the ordinary negligence action "a plaintiff . . . who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964).

[122] Prior to the adoption of the rules a federal court could not order such examination unless aided by state law. Union Pacific R.R. v. Botsford, 141 U.S. 250 (1891).

examining and the party examined. The party examined may request and obtain full details of the report of the examining doctor; his request constitutes a waiver of the doctor-patient privilege as to his own doctors, and he must furnish similar information to his adversary.[123]

The refusal of the examined party to request a report of the examination does not, however, preempt other discovery devices, in the absence of the privilege under controlling state law.[124]

D. *Production of Documents*

Sections 1658[125] and 1659[126] govern subpoenaes duces tecum and the production of records, documents, and books in Mississippi courts. The right to inspect, copy, or have produced is granted by the court on sworn motion[127] which described the written material with particularity and states its materiality and relevance.[128] The decision to grant the motion *vel non* is within the discretion of the court.[129]

In this area also, the Federal Rules are much broader than practice in the Mississippi courts. Under Rule 34, any party may request of any other party the production for inspection and copying of any sort of document or other "tangible thing" within the party's possession and control. He may also demand permission to enter on the land or property of a party to inspect, measure, [130] survey, photograph, test or sample the property or other objects. Although restricted to parties, the rule envisions independent action to obtain pertinent information of similar nature against non-parties.[131]

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[123] RULE 35(b)(1).

[124] Advisory Committee's Note to Rule 35 (b), 48 F.R.D. 529, 530.

[125] MISS. CODE ANN. (1942).

[126] MISS. CODE ANN. (1956).

[127] Long v. Sledge, 209 So. 2d 814 (Miss. 1968); Equitable Life Assurance Soc'y v. Clark, 80 Miss. 471, 31 So. 964 (1902).

[128] Board of Review v. Williams, 195 Miss. 618, 15 So. 2d 48 (1943). The Board had failed to waive answer under oath; Williams filed a verified answer stating that Dillard was employed by him individually as a farm laborer, thus excluded from compensation. The court held, therefore, that on the record before it, the subpoena duces tecum must be denied; the books and payrolls of Williams Contracting Co. were neither pertinent nor relevant. Dent v. Luckett, 242 Miss. 559, 135 So. 2d 840 (1961), ruled that before photographs which the defendant had caused to be taken in connection with a negligence action, the motion must be specific as to the particular photographs desired and what they portray.

[129] Long v. Sledge, 209 So. 2d 814 (Miss. 1968).

[130] RULE 34(a).

[131] RULE 34(c): "This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

Prior to 1970, the requesting party was required to show "good cause" in his motion for production of documents under Rule 34. Although the Supreme Court legitimized "fishing expeditions" in federal discovery in 1947,[132] many courts still interpreted the "good cause" requirement as prohibiting fishing expeditions in demands for documents under the rule.[133] This requirement was therefore omitted by the 1970 amendments to the Federal Rules, and the rule now only requires the same relevance of material as is required under the other discovery devices.[134]

The extension of the "property inspection" provision to include "any designated object thereon" affords obvious opportunities to a plaintiff in a broad range of cases.[135]

E. *Request for Admissions*

One of the most effective time savers among the federal discovery rules is the request for admissions under Rule 36. Its proper use can reduce trial preparation time and efforts of counsel, and simplify and shorten the trial itself. There is no parallel procedure under Mississippi practice. The rule permits a party to demand admissions of the truth of any matter within the scope of federal discovery and relevant to the action, including the genuineness of documents. The request is for the purpose of the pending action only, and the information requested is deemed admitted unless otherwise answered or objected to within thirty days. If the answering party denies without good cause, he may be required to pay the opposing party's cost in proving the matter he has frivolously denied.

The rule carefully spells out the procedure to be followed, requires a good faith response, and provides adequate machinery to obtain court determination of matters in dispute under the rule. Admissions are conclusive unless withdrawn with court permission.[136] The rule permits

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[132] "No longer can the time honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[133] Flickinger v. Aetna Casualty & Surety Co., 37 F.R.D. 533, 535 (W.D. Pa. 1965).

[134] RULE 26(c)(1).

[135] The provision has been used: to obtain deviational and directional surveys of an oil and gas well, Williams v. Continental Oil Co., 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955); to inspect the process practiced in a plant in a patent infringement suit, Dow Chemical Co. v. Monsanto Company, 256 F. Supp. 315 (S.D. Ohio 1966); to inspect the vehicle involved in a collision in a tort suit, Sacco v. Greyhound Corp., 24 F.R.D. 257 (W.D. Pa. 1959); to take x-rays of an allegedly defective handbrake assembly in a product's liability case, Quinn v. Chrysler Corp., 35 F.R.D. 34 (W.D. Pa. 1969).

[136] RULE 36(b).

requests for admissions of opinions and conclusions, as well as disputed issues, including those central to the suit.[137]

F. *Sanctions Under the Federal Rules*

Sanctions in state discovery practice are discussed under the appropriate topic. Rule 37 provides penalties for failure to make discovery in federal courts. The rule emphasizes the interdependence of the federal discovery rules. Except for the physical and mental examination of a party, the rule leaves the court out of the discovery procedure until a dispute breaks out between the parties. At that point, procedure for speedy court resolution of the dispute is available. The matter is usually presented to the court by motion. The moving party must be prepared to show justification for his position or run the risk of being assessed with opposing party's expenses, including attorney's fees.[138]

Failure to comply with a court order can result in a contempt[139] order, an order declaring the facts in question as established,[140] or an order prohibiting the disobedient party from introducing the evidence in question or asserting or opposing the claim in question.[141] In extreme cases, the action may be dismissed or the defenses stricken.[142]

Although broad, the rule has obvious constitutional limitations, particularly where the sanction imposed is dismissal of the action.[143] The rule as presently written leaves the severity of penalty for noncompliance to the discretion of the trial judge. Judges generally have refrained from imposing severe penalties when the party involved made a good faith effort to comply.[144]

III. Third Party Practice

> It is the policy of law to have all matters settled in one suit, and to avoid a multiplicity of suits.[145]

All persons who are materially interested, legally or equitably,

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[137] Wright & Miller § 2256, at 715, 717.

[138] Rule 37(a)(4).

[139] Rule 37(b)(1) and (d)(2).

[140] Rule 37(b)(2)(A).

[141] Rule 37(b)(2)(B).

[142] Rule 37(b)(2)(C).

[143] *See, e.g.*, Societe Internationale v. Rogers, 357 U.S. 197 (1958).

[144] Annot., 2 A.L.R. Fed. 811 (1969).

[145] Garrett v. Mississippi State Highway Comm'n, 237 Miss. 478, 484, 115 So. 2d 527, 529 (1959).

> in the subject matter of a suit ought to be made parties therein. . . .[146]

> Equity delights to do complete justice and not by halves . . . . There not only may, but generally must, be included in the one suit every clearly evident feature of the controversy and there must be made as parties all those substantially interested, so that when the matter is thus settled there will be no doors left open out of which it is probable that further suits or further contention will spring.[147]

Isolated quotations from Mississippi circuit and chancery sources indicate a wide third party practice consistent with modern reform. The quotations are deceiving. Joinder of parties, intervention and impleader remain virtually undisturbed in Mississippi since the beginnings of its court system. With a few statutory changes, the rules are those in use in the nineteenth century. Verbal recognition that justice and efficiency require the hearing of all related matters at one time has been negated by legislative inaction and conservative judicial interpretation.

At common law, the substantive right of the named parties litigant was the sole controlling factor in litigation. Joinder was not used to avoid multiple trials; therefore, plaintiffs were compelled to join in a suit only if their rights were joint. Optional joinder of parties plaintiff was not recognized. Joinder of parties who had rights in the alternative or who were alternately liable was forbidden. The sole necessary co-defendant was the joint obligor. Joint tortfeasors were permitted in the same suit, separate tortfeasors could not be joined.[148]

The same rules are substantially in effect in Mississippi circuit practice today. There are two notable areas of change: the addition of the lien statutes[149] which delineate those entitled to liens and denominate them necessary parties to a suit,[150] and the statute permitting joint or separate suit against those jointly liable in contract.[151]

Because early equity practice was broader, with emphasis directed against a multiplicity of suits, current equity third party practice is less restrictive than circuit. Chancery allows permissive, as well as compulsory joinder.[152] Those plaintiffs who are compelled to join are all those

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[146] Stephenson v. New Orleans & N. E. R.R. Co., 180 Miss. 147, 176, 177 So. 509, 518 (1938).

[147] GRIFFITH § 36.

[148] C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 241, 273 (1928) [hereinafter cited as CLARK].

[149] MISS. CODE ANN. §§ 362-382.20 (1942).

[150] MISS. CODE ANN. §§ 361, 371-74 (1942).

[151] MISS. CODE ANN. § 335 (1942).

[152] CLARK, *supra* note 148, at 242.

whose interests would be directly affected by the decree, *i.e.*, those with a joint or united interest.[153] Any necessary complainant who refuses to join or is unable to join, must be brought in as defendant.[154] Those complainants who are permitted to join are those with a harmonious community of interest in the subject matter or the ultimate relief sought;[155] permission to join is within the discretion of the chancellor. The bill is declared multifarious if the joinder will prejudice the defendant.[156] Judicial decisions indicate that different actions against one defendant, and one action against several defendants are permissible; different actions against several defendants render the bill multifarious.[157]

The defendants who may be sued in one chancery action are those (1) who have or claim any interest in the subject matter of the suit adverse to the complainant, or (2) whose presence is necessary or proper to a complete determination and settlement of the issues involved.[158]

Intervention, born in the civil law[159] and adopted first by chancery, later by circuit procedure, "was unknown to the common law, and is permissible only when authorized by a statute."[160] In circuit court, intervention is allowed:

1. in replevin[161]
2. in attachment[162]
3. by an employer in a suit by an injured employee against another party[163]
4. by the owner of economic poison which has been seized[164]
5. by creditors of a solvent bank which is being dissolved[165]

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[153] *Id.* at 248.

[154] [T]he term joint interest has not that strict meaning as at law but rather means a united or concurrent interest, a connected interest with the same essential nature and origin . . . . It covers, generally, all cases of joint tenants or tenants in common, co-trustees, partners, joint owners or owners in common, joint contractors, joint obligees and the like, where a decree in favor of only one of them would be incomplete and partial, leaving outstanding other interests of equal dignity. GRIFFITH § 138.

[155] CLARK, *supra* note 148, at 248.

[156] *Id.* *See* MISS. CODE ANN. § 1307 (1942).

[157] Calcote v. Wise, 219 Miss. 270, 68 So. 2d 477 (1953).

[158] GRIFFITH §§ 141, 142; Roberts v. Burwell, 117 Miss. 469, 78 So. 357. "Several defendants may be joined where their interest and liability, though separate, flow from the same fountain, or radiate from the same center or have a common connecting link." MISS. CODE ANN. §§ 1323-26 (1942).

[159] GRIFFITH § 410, n. 13.

[160] Shoemake v. Federal Credit Co., 188 Miss. 683, 689, 192 So. 561, 562 (1940).

[161] MISS. CODE ANN. § 2864 (1942).

[162] MISS. CODE ANN. § 2725 (1942).

[163] MISS. CODE ANN. § 6998-36 (1956).

[164] MISS. CODE ANN. § 5000-09 (c) (1956).

[165] MISS. CODE ANN. § 5225 (d) (1942).

6. in a hearing on unfair insurance competition[166]
7. by a laborer or materialman for a public contract.[167]

The circuit court intervenor may not file a cross-bill or a counterclaim.[168]

Chancery allows intervention by an owner or claimant with an immediate interest in the "property or substantial subject matter involved in the suit . . . ."[169] The instances in which intervention is usually allowed are:

1. to claim property or funds involved in the litigation
2. under a bill, order or decree which allows creditors, claimants and beneficiaries to become parties
3. as a cestui que trust to protect his interest
4. sometimes in reference to unreported bids at judicial sales.[170]

By recent statutes, anyone damaged by a violation of the Dairies and Creameries Act,[171] anyone aggrieved by the findings of a soil conservation board,[172] and property owners who wish to resist or advocate a proposed drainage district[173] may intervene.

The impleader statutes are even more limited. Drainage district commissioners,[174] flood control commissioners,[175] railroad corporations[176] and state highway commissioners[177] are allowed to sue and be sued, plead and implead.

The limitations placed on third party practice by Mississippi procedure require a curative statute for misjoinder or nonjoinder of a plaintiff or defendant. If written notice is given with the answer, the judge may allow amendment "to obviate the objection, upon such terms as may be proper."[178]

The contrast between the enumerated, limited occasions when additional parties are compelled to join or may intervene in a Mississippi lawsuit, and the broad concepts of the Federal Rules governing joinder is glaring. Certainly the usual practice is to allow the plaintiff free choice of who shall be parties to his lawsuit, but he "cannot be per-

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[166] MISS. CODE ANN. § 5649-06 (b) (1956).
[167] MISS. CODE ANN. § 9014 (1942).
[168] *See* Carruth v. Easterling, 247 Miss. 364, 150 So. 2d 852 (1963).
[169] GRIFFITH § 410.
[170] *Id.* n. 14.
[171] MISS. CODE ANN. § 4560-118 (d) (Supp. 1968).
[172] MISS. CODE ANN. § 4951 (d) (Supp. 1970).
[173] MISS. CODE ANN. § 4676 (Supp. 1970).
[174] MISS. CODE ANN. § 4606 (Supp. 1970).
[175] MISS. CODE ANN. § 4776 (1942).
[176] MISS. CODE ANN. § 7725 (1942).
[177] MISS. CODE ANN. § 8038 (c) (1942).
[178] MISS. CODE ANN. §§ 1457 and 1458 (1942).

mitted an unfettered choice . . . because there may be others, not named by plaintiff, so closely connected with the controversy that it would be desirable to have them as parties."[179]

Three classes of interests, other than those of the plaintiff, should be considered: "(1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice."[180] Under Rule 19(a):

> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant. Rule 19(b) lists the criteria by which the court will decide whether to proceed without the indispensable party or to dismiss. The ultimate criterion is "equity and good conscience."[181]

If a party's relation to the action is not so close that he is labelled "indispensable," but is close enough to make his presence desirable, Rule 20, applicable to the joinder of plaintiffs and defendants, is available. Two tests must be met: (1) There must be some question of law or fact common to all parties which will arise in the action, and (2) there must be some right to relief asserted on behalf of each of the plaintiffs, and against each of the defendants, relating to, or arising out of, a single transaction or occurrence or series of transactions or occurrences. These tests are cumulative and both of them must be satisfied to permit join-

[179] WRIGHT, *supra* note 21, § 70.

[180] Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957).

[181] Provident Tradesmen B. & T. Co. v. Patterson, 390 U.S. 102 (1967). The Supreme Court held that Rule 19 determined whether a person who cannot be joined is truly indispensable so that the action must be dismissed. The Court considered the following in deciding whether an action must be dismissed for want of a so-called indispensable party: (1) The plaintiff has an interest in having a forum. (2) The defendant has an interest in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with others. (3) The outsider whom it would have been desirable to join has an interest in resolving the issues. (4) The courts and the public have an interest in complete, consistent, and efficient settlement of controversies. In this case, the court believed that all four of these interests were served by proceeding with the trial, as the district court had done.

der; however, if there is a common question of law or fact, the cases may be consolidated for trial, under Rule 42 (a), even though the "same transaction or occurrence" test is not met.[182]

Of primary, innovative importance is the provision of Rule 20 (a) which allows joinder even though liability and right to relief is asserted jointly, severally or alternatively, provided the above two tests are met. Mississippi rules on joinder end with the word "jointly."[183] Although the federal practice joinder rules are very broad, there is adequate protection to avoid the use of joinder to cause undue delay or prejudice. Rule 20 (b) and 42 (b) empower the court to order separate trials, to consolidate, or make other necessary orders to protect the parties as well as promulgate justice.[184] "In this way the scope of a civil action is made a question for the discretion of the judge, to be decided on practical considerations in a particular case, rather than a question governed by conceptual tests, as was true under some of the codes and at common law."[185]

Intervention in a Mississippi court action, as noted above, is possible only when allowed by statute. According to the Federal Rules, intervention under a statutory provision is the beginning rather than the end; it is the least used basis for intervention.[186] Rule 24 (a) gives one the right to intervene if a statute grants the absolute right or if he can show that he has an interest relating to the property or transaction involved; that disposition of the action may impair, as a practical matter, his ability to protect his interest; and that his interest is inadequately represented by the present parties.[187] Rule 24 (b) refers again to a statutory provision. If a statute grants a conditional right to intervene, one may do so. Absent a statute, one may be permitted to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common."[188] The intervenor's interest need not

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[182] WRIGHT, *supra* note 21, § 71; 2 BARRON & HOLTZOFF § 531-35; Stanford v. Tennessee Valley Authority, 18 F.R.D. 152 (M.D. Tenn. 1955).

[183] CLARK, *supra* note 148, at 241.

[184] BARRON & HOLTZOFF § 943-4; United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966).

[185] WRIGHT, *supra* note 21, § 71.

[186] R. LAVINE & G. HORNING, JR., MANUAL OF FEDERAL PRACTICE § 3.149 (1967).

[187] Rule 24 (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. *See* WRIGHT, *supra* note 21, § 75.

[188] RULE 24(b)(2).

be a direct personal or pecuniary one, nor must he be one who was a proper party at the beginning of the suit. Once in the suit, the intervenor may assert a counterclaim.[189]

Impleader, Rule 14, allows a defendant to bring into the suit as a third-party defendant anyone who is or who may be liable to the defendant for all or part of the plaintiff's claim. In this way, even-handed, complete justice is expeditiously and economically administered. It is typically used to assert claims for indemnity, subrogation, contribution, and for breach of warranty. When used with Rule 18 (a),[190] the defendant who has asserted a claim suitable for impleader, may join all of his other claims against the third-party defendant,[191] regardless of their nature. Claims are never labelled misjoined.[192]

Under the federal third-party practice rules, the avowed ideal of Mississippi practice would be realized:

> Equity delights to do complete justice and not by halves . . . . There not only may, but generally must, be included in the one suit every clearly evident feature of the controversy and there must be made as parties all those substantially interested, so that when the matter is thus settled there will be no doors left open out of which it is probable that further suits or further contention will spring.[193]

In 1971 Mississippi practice, there are many doors left open out of which further suits and further contention must spring if complete justice is done.

Conclusion

> If justice is but truth in action, as Disraeli advises, then it is clear that the most just of laws is nothing more than academics, unless it is effectively applied.[194]

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[189] Wright, *supra* note 21, § 75. Intervention may be allowed where the intervenor has an economic interest in the outcome of the suit, although not a direct or legal interest. In Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), neighbors were allowed to come into an action to set aside a zoning order. A firemen's union was allowed to intervene when the Brotherhood of Locomotive Engineers sought a declaratory judgment that its agreement with the railroad allowed its members to work more miles and days than they were working. The firemen argued that the more days the engineers worked, the fewer days firemen worked. Brotherhood of Locomotive Engineers v. Chicago, M. St. P. & P. R.R., 34 F. Supp. 594 (E.D. Wis. 1940).

[190] "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party."

[191] Crompton-Richmond Co., Inc., Factors v. United States, 273 F. Supp. 219 (S. D. N.Y. 1967). *See* Barron & Holtzoff § 426.

[192] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 Harv. L. Rev. 591, 595 (1968).

[193] Griffith § 36.

[194] Wright & Miller, Foreword at vi.

Encouraging signs point toward the improvement of Mississippi's judicial system. The study and recommendations of the Mississippi Judiciary Commission should encourage a number of needed reforms over the next several years.[195] The state's judiciary has received a needed increase in salary. The circuit and chancery judges have adopted new rules aimed at more efficient court administration.

Procedural reform falls logically within this new approach,[196] and the need for change in the above discussed areas of Mississippi practice is apparent.

The Federal Rules of Civil Procedure offer an approach which has stood the test of time, an approach which has been almost universally approved.[197] The incorporation of the Rules into the procedural structure of our state courts would meet a need which has been long present, a need which is certain to increase as our court dockets grow.

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[195] Paine, *Mississippi Judiciary Commission, A Synopsis*, 41 MISS. L.J. 22 (1970).

[196] The Mississippi Judiciary Commission recommends that the legislature should revest the rule-making power in the courts with initiation by an Advisory Committee with notice to the local bar and with veto power in the legislature. *Mississippi Judiciary Comm'n Report* to the 1970 session of the Legislature, at 16-17.

[197] "It is now almost universally conceded that these rules have given to the federal courts in their civil jurisdiction the best code of practice that is to be found anywhere in this country, or for that matter anywhere in the world." Parker, *Book Review*, 57 HARV. L. REV. 735, 736 (1944).

REQUIREMENTS FOR VALID COMPROMISE SETTLEMENT OF WRONGFUL DEATH CLAIMS IN MISSISSIPPI

*Rowland W. Heidelberg**

Introduction

The purpose of this article is to analyze the problems relating to voluntary compromise settlement of claims arising under the Mississippi Wrongful Death Statute, Mississippi Code Annotated § 1453 (Supp. 1970), and to suggest procedures to obtain a valid release, binding upon all possible claimants.

The difficulty centers around the language in Section 1453 which permits a suit to be brought by any one of the statutory beneficiaries, or the personal representative of the deceased, for the benefit of all parties concerned, ". . . but the determination of such suit shall not bar another action unless it be decided on its merits." The problems have been accentuated by a decision of the United States Court of Appeals for the Fifth Circuit, *Evans v. Cheatwood*,[1] which seemingly casts doubt upon the validity of releases obtained through chancery court proceedings authorizing settlement of doubtful claims simply because there had been no final determination of the case "on the merits." This decision is discussed in detail in Section H below. When analyzed in the light of the record presented to the court of appeals, the doubts raised by the decision are more apparent than real.

A. Statutes

The following sections of the Mississippi Code[2] should be noted:

> Section 1453. It is provided that actions for wrongful death may be brought by any one or more of certain specified survivors of the deceased, or by his personal representative, or all parties interested may join in the suit, ". . . and there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits."

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[1] 329 F.2d 583 (5th Cir. 1964).

[2] Miss. Code Ann. §§ 422, 607, 1264-1268, 1270-1271 (1956) and 1453 (Supp. 1970).

Section 422. "Guardians may be empowered by the [chancery] court, or chancellor in vacation, to compromise claims due their wards on the same proceedings and under the same circumstances prescribed in reference to the . . . compromise by an executor or administrator of claims belonging to the estate of a deceased person. . . ."

Section 607. The court, or chancellor in vacation, ". . . on petition for that purpose, may authorize the executor or administrator to . . . compromise any claim belonging to the estate which cannot be readily collected. . . ."

Sections 1264-1268 set forth the requirements and procedure in the chancery court for the removal of disabilities of minority of a minor.

Sections 1270-1271 establish a procedure for determining identity of heirs.

B. Settlement When All Beneficiaries are Sui Juris

No problems are presented when all of the claimants are competent adults. In such cases, the Mississippi Supreme Court has expressly stated, "It is beyond doubt that each adult beneficiary entitled to share in the damages for a wrongful death . . . has the right to compromise and settle his claim therefor. . . ."[3] A simple release from each adult beneficiary is all that is required to effectuate a valid settlement.

If a minor claimant is approaching the age of majority, his disabilities of minority may be removed, either generally or specially, for the purposes of effecting the settlement, under the procedure outlined in Sections 1264-1268. Most chancellors require the minor to be twenty years of age for a general removal of disabilities and at least eighteen years of age for a special removal, but there is no fixed requirement. After such emancipation, settlement is made directly with the emancipated minor, as with an adult, although the normal practice is to make reference to the proceedings for removal of disabilities of minority in the settlement release.

C. Settlement With Guardians

Section 422 expressly authorizes the chancery court to empower guardians to compromise claims due their wards on the same proceedings and under the same circumstances prescribed in reference to compromise by an executor or administrator of claims belonging to the estate of a deceased person. Section 607 is the section which deals with settlement of doubtful claims by an executor or an administrator. It

[3] Fox v. Fairchild, 133 Miss. 617, 627, 98 So. 61, 62 (1923).

provides that the court or the chancellor in vacation may authorize the executor or administrator to compromise any claim belonging to the estate "which cannot be readily collected." Thus, the chancery court may authorize a guardian to compromise any claim belonging to the ward "which cannot be readily collected." The supreme court has held that these statutes apply to claims of the ward arising *ex delicto* as well as those arising *ex contractu*, and that a guardian may be authorized to settle a wrongful death claim on behalf of the ward.[4] Further, the supreme court has expanded the ruling by holding that the chancery court has jurisdiction to appoint a guardian for a minor whose only estate is a right of action for wrongful death of a parent, and to authorize the guardian to compromise the claim at any time after the grant of letters of guardianship.[5]

D. Settlement With Administrator

Section 607, which provides for settlement of claims belonging to the estate "which cannot be readily collected," makes no specific reference to wrongful death claims arising under Section 1453; nevertheless, it is clearly applicable to such claims.[6] Further, a release executed by the executor or administrator, when so authorized, is binding upon all interested parties. The supreme court has said:

> By this statute the personal representative of the deceased person is expressly authorized to bring the suit for the benefit of all persons entitled under the law to recover for such death, and in such a suit the administrator represents all parties beneficially interested in the recovery, and any settlement by such administrator, which is duly and properly authorized by a valid decree of the chancery court, is binding upon all such interested parties.[7]

E. Attempts to Settle Without Chancery Court Approval

What has been said in sections C and D above with respect to settlement with guardians and administrators applies only where the settlement is duly authorized by valid chancery court proceedings under Sections 422 and 607. It is noted that Section 1453 provides that suit

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[4] *Id.* The court stated that the statute "was meant to confer upon the court the power to authorize guardians to settle for their wards any claims the wards could settle for themselves were they adults."

[5] Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720 (1928).

[6] Rowe v. Fair, 157 Miss. 326, 128 So. 87 (1930); Keanum v. Southern Ry., 151 Miss. 784, 119 So. 301 (1928).

[7] Rowe v. Fair, 157 Miss. 326, 128 So. 87, 90 (1930).

by one of the named beneficiaries or by the personal representative shall not bar another action "unless it be decided *on its merits. . . .*" (emphasis added). Notwithstanding this clear caveat, attempts have been made to discharge liability by paying a judgment obtained without an actual trial on the merits, and without seeking or obtaining chancery court approval. These efforts have been unsuccessful.

In *Sudberry v. Meridian Fertilizer Factory*,[8] the defendant fertilizer factory and one of the beneficiaries reached a fraudulent agreement to settle the death claim of an eighteen-year-old boy, without authority and over the objections of the other beneficiaries. The scheme adopted was for the father of the deceased to file suit in the justice of the peace court seeking $200 damages for the death of the boy. The defendant allowed a default judgment to be rendered in the amount sued for and then paid the judgment to the father. Later another suit was filed by the other heirs at law, and the defendant pleaded the earlier judgment as res judicata. The supreme court wasted no time in declaring the prior judgment a nullity and ruling that it did not bar the subsequent suit. In so doing, the court indicated strong policy considerations.

> The legislature seems to have thought it was sometimes difficult to find all of the parties interested in cases of this kind, and for this reason, or for the reason that all parties interested may not agree to sue, the right to sue was given to any one of the parties mentioned, such suit to conclude all others, *provided,* the suit was decided upon its merits.
>
> . . . .
>
> It is unnecessary to reach the conclusion that any actual fraud was intended in order to condemn the proceedings in question. If the statute is designed to protect the interest of all parties, and to this end *requires a judicial determination of the rights of absent relatives,* the judgment pleaded will not bar this action.
>
> It is believed that it was the purpose of the legislature to prevent a multiplicity of suits, and to insure a square deal to all interested parties not participating in the trial of the case.
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> One can sue for and conclude all; but to conclude all there must be a decision—*a judicial determination of the case on its merits—not merely an agreed judgment for a fixed sum* absolutely insufficient to pay for killing a boy eighteen years of age.
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> If the defendant was liable at all, the amount of the judgment is so ridiculously inadequate as to raise a just suspicion of

[8] 106 Miss. 744, 64 So. 723 (1914).

> collusion, or, at least, an inference that the merits of the controversy formed no part of the decision of the court.
>
> . . . .
>
> The statute, we believe, was designed to prevent one interested party from agreeing upon and collecting a sum of money, satisfactory to him, but not at all satisfactory to others, or to the merits of the case. The statute seems to contemplate a jury trial, and it was not believed that the price of a human life would ever be fixed within the jurisdiction of a justice of the peace. Be that as it may, it is our opinion that the judgment rendered by the justice of the peace is not a bar to this action. . . .[9]

In *McCraney v. New Orleans & N.E. R.R.*,[10] a judgment in an earlier suit for wrongful death was pleaded as res judicata in a subsequent suit by the heirs. A replication to this plea, admitted on demurrer, alleged that the judgment in the first suit was void because of fraud and collusion.[11] The supreme court, noting that the allegations of the replication were admitted by demurrer, held that the judgment obtained in the earlier suit, in the manner outlined, was not a bar to the second suit and remanded the case for hearing on the facts so charged. The court said:

> In the present case the judgment recites that the jury heard the evidence and instructions and returned a verdict, upon which judgment was entered.
>
> It is not necessary in the present appeal to decide what effect it would have on the judgment rendered in the first suit, if it were shown that it was filed by the consent or authority of the widow, if it was not in fact tried on its merits by the jury.
>
> The replication to the plea distinctly alleges fraud. It alleges that neither their mother nor themselves authorized such

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[9] *Id.* at 752-54, 64 So. at 724 (emphasis added). The court's outrage was indicated by this parting shot: "It is difficult to conceive that any court could decide this case on its merits and give judgment for two hundred dollars, for the wrongful killing of a boy—a sum less than the market price of a good mule." *Id.* at 754, 64 So. at 724.

[10] 128 Miss. 248, 90 So. 881 (1922).

[11] The replication alleged: The defendant's attorney prepared and filed a declaration on behalf of the plaintiffs, seeking $1,500 damages; he then on behalf of the defendant filed a plea of general issue; he then prepared and filed a judgment in favor of the plaintiff for the amount demanded in the declaration; there was no trial whatsoever on the merits of the suit; no testimony was presented to the court; the plaintiffs, some of whom were minors without guardians, knew nothing of the filing of the suit and entry of the judgment and did not authorize the defendant's attorney to file the same; the amount sued for in the first suit was grossly and ridiculously inadequate; the defendant's claim agent misrepresented the facts to the plaintiffs and concealed other facts and fraudulently procured signatures to the earlier delaration. *Id.* at 255-56, 90 So. at 881-82.

> suit to be filed or knew anything of such suit having been filed; that it was filed and judgment taken by the attorney for the defendant without their authority. It is further alleged that the claim agent represented that the document signed by Mrs. McCraney was merely a document to show payment.[12]

The case of the *Estate of George Jones v. Culley*[13] did not involve the wrongful death statute, but the supreme court considered the requirements of Sections 422 and 607. A guardian brought an action in equity to cancel a deed executed by his *non compos* ward. The defendant filed a plea in bar setting up the defense of res judicata based upon an earlier decree in a former suit by the incompetent against the same defendants involving the same transaction. In the earlier suit, the chancery court had entered a decree dismissing the suit with prejudice, reciting that "an amicable adjustment has been arrived at between the parties. . . ."[14] The chancery court in the second suit held that the first dismissal was res judicata. This holding was reversed by the supreme court and the case remanded for full development of the facts relating to the dismissal of the earlier suit, to determine whether the chancellor conducted a full hearing thereon. The court said:

> Nevertheless, we think that Sections 422 and 607, Code of 1942, contemplate that the chancery court may approve a compromise of a doubtful claim on behalf of a ward of his court 'on petition for that purpose.' In the instant case there is no contention that any petition was filed as contemplated by these statutes.
>
> . . . .
>
> *Union Chevrolet Co. v. Arrington*[15] . . . specifically held that the chancery court cannot permit the rights of an infant to be prejudiced by any omission or neglect or design of a guardian; and that 'the judicial sanction thereof must be upon a real and not a perfunctory or merely formal hearing.' *Union Chevrolet* further held that the chancellor must be given the full facts and, with them before him, must approve the terms of the settlement. While the facts in *Union Chevrolet* differ from those in the instant case, some of the principles therein announced apply here.
>
> Here counsel for the two guardians simply filed a motion to dismiss the prior suit attacking the deed on the ground that an amicable settlement had been reached. The order of dismissal . . . , here under attack, recited that the motion stating there had been an amicable settlement had been filed, and the court dismissed the prior suit with prejudice.

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[12] *Id.* at 257, 90 So. at 882.

[13] 242 Miss. 822, 134 So. 2d 723 (1961).

[14] *Id.* at 825, 134 So. 2d at 724.

[15] 162 Miss. 816, 138 So. 593 (1932).

> The order failed to comply with the requirements of Code Sections 422 and 607. *Union Chevrolet* held that these statutes required disclosure to the chancellor of the full facts and an independent determination by him of the propriety of the settlement. The motion to dismiss and the order sustaining it failed to do this.
>
> . . . .
>
> However, it may be that in fact the chancery court was presented the facts and approved the settlement as fair and equitable. This presents an issue of fact which should have been developed in the trial court. If the chancellor was given the facts and approved the settlement, the order of dismissal is valid. If he was not, it is invalid, as constituting a total failure to comply with the requirements of the statutes and the above stated rules of law.[16]

The supreme court is firmly committed to the proposition that *settlement* of minors' claims can be accomplished only with chancery court approval agreeable to Sections 422 and 607. Any other procedure short of this requirement, such as agreed default judgments or judgments based on fictitious jury verdicts, are doomed to failure.[17]

F. Attempts to Settle Where Chancery Court Approval Is Obtained by Fraud or Legal Equivalent of Fraud

Section E of this article dealt with attempts to effect settlement of wrongful death claims without chancery court approval, where efforts

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[16] 242 Miss. at 829-32, 134 So. 2d at 725-27.

[17] Attention should be called to the case of Natchez Cotton Mills Co. v. Mullins, 67 Miss. 672, 7 So. 542 (1890). The widow of the deceased filed a wrongful death action on behalf of herself and her minor children and obtained a judgment for $6,000. An appeal with supersedeas was taken. While the appeal was pending, the widow compromised the case accepting from the defendant $1,000 in full satisfaction of the judgment. The minor plaintiffs were without a guardian and the compromise was made without court authority. This procedure was upheld by the supreme court which held "the widow alone had the right of action, and she had the right to accept satisfaction, and discharge the defendant," and, consequently, "her children must look to her, and not to the defendant." The court said: "A Mother's love is a sufficient safeguard against improperly acquitting a defendant from liability, and the law in such cases as this has committed the interest of children to their mother. To her is committed the right of action, and she alone may control it." *Id.* at 674, 7 So. at 542-43. The wrongful death statute then in force, Miss. Code § 1510 (1872), was substantially different from the present wrongful death statute, Miss. Code Ann. § 1453 (Supp. 1970). It is possible that the difference in language alone accounts for this decision. Nevertheless, since the decision is out of step with the philosophy of our present Court, and seems to be entirely contradictory to the other cases cited herein, it is believed that the Mullins case is unsound and would not be followed today.

were made to make it appear that there had been a decision on the merits, when in truth and in fact there had been none. This section deals with attempts to settle wrongful death claims where chancery court approval was sought and obtained, but nevertheless the settlement was set aside because circumstances surrounding the chancery court approval amounted to fraud or the legal equivalent of fraud.

The first case to be noted is *Keanum v. Southern Ry.*[18] A wrongful death action was brought by the minor children of the deceased. The defendant railroad filed special pleas, denominated "pleas of res adjudicata," alleging that the administratrix of the estate of the decedent previously filed a petition in the chancery court seeking authority to compromise and settle the claim for damages for the sum of $1,000, that upon proof offered in support of the petition the chancery court granted a decree authorizing the settlement and that, pursuant to the decree, the settlement was effected by payment of the agreed sum and execution of a full and complete release by the administratrix. To these pleas in bar, the plaintiffs filed replications alleging that the decree authorizing the settlement, and the release executed in pursuance of such authority, were procured by collusion and fraud and were, therefore, invalid and constituted no defense to the present cause of action.[19] These facts were admitted by demurrer, which was sustained. The supreme court reversed:

> These replications specifically charge collusion and fraud in the institution and prosecution of these proceedings in the chancery court, and in the consummation of the compromise and the execution of the release, and we are of the opinion that these allegations of collusion and fraud are sufficiently definite to require an answer, and, if established, to avoid the decree authorizing the settlement, and the release executed in consummation thereof.
>
> In order for the release executed by the administratrix to be valid, it must be based upon a valid decree of the chancery

[18] 151 Miss. 784, 119 So. 301 (1928).

[19] The specific facts alleged were: The decree of the chancery court authorizing the settlement was procured by collusion between the administratrix and the claim agent, attorneys, and officers of the railroad; that the appointment of the administratrix was collusive and fraudulent and was not made to administer the estate and handle the cause of action in good faith on behalf of the heirs and beneficiaries but, on the contrary, was made as a result of active collusion between the administratrix and the defendant for the purpose of protecting the interest of the defendant; the administratrix was represented and advised only by the attorney for the defendant; the administratrix and agents of the defendant conspired together to conceal from the chancery court the real merits of the case, the extent of the injury to and sufferings of the deceased; and the facts were grossly misrepresented to the chancery court. *Id.* at 787-88, 119 So. at 302.

> court authorizing the compromise and settlement afterwards consummated by the execution of such release; and that it is permissible to attack judicial proceedings for fraud, and establish such fraud by parol evidence, is well settled in this state. . . .[20]

The court drew a clear distinction between (a) a final adjudication after a genuine trial on the merits, which will bar a subsequent action, and (b) a compromise and settlement with chancery court approval, which also will bar a subsequent action:

> Throughout this record and the briefs of counsel the special pleas filed in this cause are referred to as 'pleas of *res adjudicata*,' and the proceedings in the chancery court which resulted in a decree authorizing the compromise and settlement of the right of action are referred to as 'a trial of the merits of the cause of action;' but *these proceedings are in no proper sense a trial of the merits* of the cause, which may be pleaded in bar of a subsequent suit on the same cause of action. In the case of *Gunter v. Henderson Molpus Co.*. . . . it was held that the chancery court may authorize and empower a guardian to compromise and settle a minor ward's claim or right of action for damages; but *it is the consummation of said compromise and settlement and the release executed as evidence thereof that will bar a subsequent suit.*[21]

Probably the most important decision of the supreme court dealing with the requirements for obtaining a valid compromise and settlement of a minor's claim is *Union Chevrolet Co. v. Arrington.*[22] Its importance warrants a detailed review of the case. The deceased was killed in a truck collision clearly resulting from the negligence of the defendant's driver. The deceased left a widow and seven minor children. Several days later the widow reached an agreement with the defendant to settle the death claim for $1,250 plus medical, hospital and funeral expenses. Thus, the widow and each child would receive $156.25. The widow executed a release for herself and received payment of her share. The defendant's attorney prepared all papers necessary to appoint the widow as guardian of each of the seven children and obtained letters of guardianship for her. Defendant's attorney then prepared a petition on behalf of the guardian for approval of the settlement in behalf of said wards. The petition was presented to the chancellor by the defendant's attorney. The only witness produced, or who was made available to the chancellor, was the driver of the defendant's truck, this witness was the person who was at fault in causing the injury and death. The chancellor rendered a decree reciting that evi-

[20] *Id.* at 789, 119 So. at 302.

[21] *Id.* at 788-89, 119 So. at 302 (emphasis added).

[22] 162 Miss. 816, 138 So. 593 (1932).

dence had been heard. He found that the outcome of the cause of action against the defendant was doubtful; therefore he approved the proposed compromise settlement, and authorized the guardian to consummate it. Thereafter, the sum of $156.25 was paid to the guardian for each of the seven children and she executed on their behalf full and complete releases.

About a year later, the widow and children brought an action in the chancery court to set aside the releases. The relief was granted by the chancery court. Upon appeal it was affirmed as to the interest of the minors, but not as to the widow's interest. The supreme court undertook extensive examination of the two statutes authorizing compromise and settlement of doubtful claims.[23]

The court first restated the ancient equitable principle respecting the protection of infants and persons of unsound mind. After announcing that all persons who deal with guardians, or with courts in respect to the rights of infants, are charged with the knowledge of these principles and act to the contrary at their peril, the court stated:

> The two sections of our statutes authorizing the settlement of claims are imbedded in those principles and are inseparable therefrom, both in meaning and in administration. To make a compromise settlement by a guardian effective against their wards in any case the *judicial sanction thereof must be upon a real and not a perfunctory or merely formal hearing. . . . For equal reason, the chancellor is not authorized to conduct a hearing and enter a decree wherein no witness in behalf of the wards is heard, or where the only witness is one who in the very nature of things is adverse to them.* These sections contemplate and require that the chancellor in acting thereunder *shall not proceed unless the interests of the infants are actually represented and protected at the hearing.* To hear only the witness or witnesses who are adverse to the minors would be equivalent to taking a default against them—indeed, it would be equivalent in legal effect to a refusal to hear the witnesses in their behalf. *And while it is permissible for an attorney to represent both sides in presenting such a petition, provided he fully advise the chancellor thereof, he must in so doing see to it that the testimony and the witness or witnesses who will give the full facts in behalf of the minors are presented and are heard, and if this is not done then there is a fundamental omission which amounts to legal fraud,* however free from any thought of wrong the attorney may have been throughout. There was no thought of anything wrong in this case; but when in a matter of this kind ancient and obvious principles are dis-

[23] MISS. CODE §§ 1710 and 1886 (1930), now MISS. CODE ANN. §§ 607 and 422 (1956).

regarded, the law looks to that disregard and not to the intent.[24]

G. Attempts to Settle Where Some Parties Are Omitted

In cases where an action for wrongful death is prosecuted to conclusion by one of the statutory beneficiaries, provided there is a genuine trial on the merits, the resulting judgment will bar another action, whether brought by the plaintiffs in the original suit or by any of the other statutory beneficiaries. Any other disposition of wrongful death claims, except a genuine trial on the merits, must be accomplished through contract, that is, through settlement and release. Any voluntary compromise settlement must be effected with all other statutory beneficiaries, or their duly authorized representatives for all liability for a wrongful death to be discharged. One of the pitfalls in effectuating a valid settlement is the matter of determining and identifying all the statutory beneficiaries.

This particular problem is illustrated by the case of *Alack v. Phelps*.[25] Phelps was killed in a head-on collision with the defendant Alack. Phelps had been married twice. By his first marriage, he had two children. By his second marriage, he had one child.

The administrator of the Phelps estate and guardian of the younger child brought suit against Alack to recover damages because of the wrongful death of Phelps. While the case was pending and before trial, a compromise settlement was reached. The proposed settlement was approved by the chancery court which found that the younger child was the sole wrongful death beneficiary and directed the guardian to receive the full settlement and deposit it into his guardianship account and to dismiss the pending suit with prejudice. In the chancery court proceedings authorizing settlement, nothing was said concerning the two older children. Settlement was effected only with the guardian of the younger child. Apparently the defendant as well as the administrator and guardian of the younger child were of the opinion that the two older children ceased to be heirs and statutory beneficiaries of Phelps since they had been adopted by their paternal grandparents after the death of Phelps' first wife. Another wrongful death action was brought against the defendant Alack by the guardian of the two other children. The lower court overruled a special plea in bar. The court held that

[24] 162 Miss. at 827-28, 138 So. at 595-96 (emphasis added). This decision was quoted at length and with approval in the recent case of Estate of George Jones v. Culley, 242 Miss. 822, 134 So. 2d 723 (1961).

[25] 230 So. 2d 789 (Miss. 1970).

the older children, even though adopted by their paternal grandparents, were still entitled to inherit from their natural father and were, therefore, statutory beneficiaries under Section 1453, and, further, that the older children were not foreclosed by the settlement from asserting their rights under the wrongful death statute. On interlocutory appeal, the supreme court affirmed this holding. It ruled that the adoption of the older children did not affect or diminish their right to inherit from their natural father; therefore, they were still statutory beneficiaries under Section 1453. The court also ruled that there had been no determination of the first suit on its merits, even though an order of dismissal with prejudice had been entered. The court observed:

> A jury did not determine what damages were just and due to *all the parties interested.* This action was settled without trial.[26]

The court quoted from its earlier decision in the *Sudberry*[27] case that to conclude all beneficiaries, there must be a judicial determination of the case on its merits. Regarding Alack's prior settlement with the guardian of the younger child, the court relied upon its decision in the *Keanum*[28] case which held that a proceeding in the chancery court for approval of a compromise and settlement was in no proper sense a trial of the merits of the cause. The supreme court concluded:

> We do not intend to say, and we do not say, that suits cannot be compromised and settled without a trial. We do say that such settlement must be bona fide, and that *the rights of and damages to, all interested parties must be considered and settled.*
>
> Since the rights of these two little boys were not considered, and the damages to them determined, the settlement made does not bar them from asserting their rights and having their day in court.[29]

Thus, in this case, the payment of the very substantial sum of $40,000.00 for settlement proved to be effective only as to a one-third interest. The defendant still had to deal with its liability to the other two-thirds interest, simply because all interested parties were not originally included in the chancery court proceeding for approval of the settlement.[30]

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[26] *Id.* at 793.

[27] 106 Miss. 744, 64 So. 723 (1914).

[28] 151 Miss. 784, 119 So. 301 (1928).

[29] 230 So. 2d at 794 (emphasis added).

[30] A question might be raised as to whether the settlement was made also with Phelps' administrator and, if so, why it was not effective and binding on all parties under MISS. CODE ANN. § 607 (1956) and cases cited in note 6, *supra*. The answer seems to be simply that although the plaintiff in the first suit acted in a representative capacity both as administrator and guardian for the younger child, the compromise settlement was made only as guardian, not as administrator. The report of the

H. The Case of *Evans v. Cheatwood*

At first glance the decision of the United States Court of Appeals for the Fifth Circuit in *Evans v. Cheatwood*,[31] would seem to cast doubt upon the validity of chancery court approved settlements simply because the chancery court decree did not constitute a determination of plaintiff's cause of action on its merits as required by Section 1453. If this were a proper interpretation of the decision, and if such were the law in Mississippi, the question would be how one could *ever* settle a wrongful death claim belonging to a minor.[32] A study of the pleadings, testimony and briefs in the lower court and the briefs in the court of appeals, leads this writer to believe that the court of appeals did not really render a decision contrary to *Fox v. Fairchild*,[33] *Gunter v. Henderon Molpus Co.*,[34] and *Rowe v. Fair*.[35]

The action before the court of appeals was commenced by Annie Plummer Evans in the Circuit Court of Forrest County, Mississippi, seeking damages for the wrongful death of Lifus Bradford, brother of the plaintiff. The suit was removed to the United States district court. The defendant filed an answer, pleading as affirmative defenses: (1) a purported final judgment entered by the United States district court in a former suit for the same death, Civil Action No. 1549, alleging that said judgment was res judicata, and (2) that a release had been obtained from the administratrix of the estate of the decedent pursuant to decree of the Chancery Court of Forrest County, Mississippi, on an ex parte petition to settle an alleged doubtful claim. The plaintiff filed motions to strike both of the defenses because "there had been no final deter-

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decision so indicates. The chancery court directed "the guardian" to deposit the full $40,000 in his guardianship account and authorized "the guardian" to dismiss the pending suit. 230 So. 2d at 790-91. The settlement was "solely" for the benefit of the younger child. *Id.* at 791. The settlement on its face covered only one claim, that of the younger child. *Id.* It is interesting to speculate as to the result if the first settlement had been made with the administrator on behalf of all parties, with appropriate prior chancery court approval, rather than with the guardian of the younger child alone.

[31] 329 F.2d 583 (5th Cir. 1964).

[32] It is this aspect of the Cheatwood case which has caused much concern among the bench and bar of Mississippi since 1964. The court of appeals seemingly held that Section 1453 requires, in all events, a determination on the merits, and that a release authorized by the chancery court is invalid unless there has been such a determination of the case on the merits. However, the Mississippi Supreme Court said in the Keanum case that such a chancery court proceeding is *not* a trial of its merits. Therefore, it would follow that a Section 1453 claim of a minor can never be *settled*. It could be determined only by a full scale, adversary jury trial.

[33] 133 Miss. 617, 98 So. 61 (1923).

[34] 149 Miss. 603, 115 So. 720 (1928).

[35] 157 Miss. 326, 128 So. 87 (1930).

mination of plaintiff's cause of action on its merits as provided by Section 1453 . . . ."[35] The defendant moved for summary judgment. The district judge overruled plaintiff's motions to strike the affirmative defenses and sustained the defendant's motion for summary judgment, and dismissed the suit. In stating the issues presented on appeal, the court of appeals said:

> The *sole issue* before the court was, and here is, whether or not the purported *final judgment* obtained in Civil Action No. 1549 *and release of administratrix*, pursuant to the Chancery Court of Forrest County, Mississippi, decree on an ex parte petition, *constitute a determination of plaintiff's cause of action on its merits*, so as to bar her claim for the wrongful death of the deceased, Lifus Bradford, under Sec. 1453 of the Mississippi Code of 1942 as Annotated and Amended.
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> The district judge, after hearing argument, entered judgment based on an opinion, in which, discussing the facts and canvassing the cited cases, it was held that the *judgment* pleaded in defense of the suit was *res judicata* under Rowe v. Fair . . . .[37]

The court of appeals felt that the sole issue was whether the final judgment in Civil Action No. 1549 *and* the release of the administratrix pursuant to a chancery court decree constituted a determination of the plaintiff's cause of action "on its merits." The clear implication is that an administrator's release authorized by the chancery court is not binding on all parties unless there has been a decision "on the merits." The opinion states no facts concerning the judgment entered in the prior suit, Civil Action No. 1549, and there is nothing in the report of the case to indicate why the final judgment was not res judicata. The question remains: "*What was wrong with the release executed by the administratrix?*" The second paragraph of the opinion quoted above states that the district judge held that the "judgment" was res judicata. Nothing is said as to what the district judge ruled on the validity of the release.

The contentions made by the plaintiff-appellant on appeal were:

> Appellant is here insisting that the court erred in granting summary judgment for appellees when, under the Mississippi statute and decisions, as a matter of law it is clear that the judgment relied on did not constitute a 'determination of appellant's suit on its merits' under Sec. 1453 Miss. Code 1942, Annotated and Amended, and because under the principles governing the grant of summary judgment there were at least

[36] 329 F.2d at 584.

[37] *Id.* (emphasis added).

> issues of fact as to whether the judgment relied on was such a determination.[38]

The appellant insisted that the "judgment" did not constitute a determination of the appellant's suit on its merits. Nothing is said about the validity of the release. The second contention seems to relate to issues of fact as to whether the judgment relied upon was a determination on the merits, which issues of fact should have been tried by the district judge, thus making summary judgment inappropriate. The court of appeals agreed with both contentions:

> Certainly the judgment relied on on its face was not 'a determination of the case on the merits' but only a settlement of the controversy.
>
> In the alternative, we agree that if this is not so as a matter of law, there were certainly issues of fact which had to be determined in order to reach the conclusion the district judge reached, that the judgment was a final determination on the merits. In reaching this conclusion, we are not unmindful of the decision of Rowe v. Fair . . . on which the district judge relied.
>
> Assuming, without deciding, that the Rowe case was correctly decided on its facts, it is quite clear that that case did not overrule Sudberry v. Meridian Fertilizer Factory, ... and Keanum et al. v. Southern Ry. Co., . . . and that those cases are controlling in this case on its facts.[39]

The court of appeals took notice of *Rowe v. Fair*,[40] but stated that it did not apply. Instead, the court of appeals said that the cases of *Sudberry v. Meridian Fertilizer Factory*[41] and *Keanum v. Southern Ry.*,[42] were controlling. Both *Sudberry* and *Keanum* were cases where fraud and collusion underlay and vitiated the prior settlement or determination. *Sudberry* involved a fraudulent agreement to enter judgment in the justice of the peace court for $200 in a death case. *Keanum* involved charges, admitted on demurrer, that the chancery court proceedings, authorizing the administrator to settle, had been procured through fraud and collusion, and the true facts had been fraudulently concealed from the chancellor. This gives some hint as to what the issues of fact were which the court of appeals felt should have been tried by the court below. There being issues of fact, summary judgment should not have been granted. Since *Sudberry* and *Keanum* were felt to be controlling in the *Cheatwood* case "on its facts," there must have

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[38] *Id.*

[39] *Id.* at 584-85.

[40] 157 Miss. 326, 128 So. 87 (1930).

[41] 106 Miss. 744, 64 So. 723 (1914).

[42] 151 Miss. 784, 119 So. 301 (1928).

been issues reflected by the record, which are not reflected by the opinion, involving charges of fraud and collusion with respect to the chancery court proceedings authorizing the administrator to settle the first suit.

It would seem that the decision in the *Cheatwood* case was nothing more than a ruling that the motion to strike one or both of the affirmative defenses raised issues of fact which should have been tried by the lower court; therefore, the lower court should not have granted summary judgment. Viewed in this light, *Cheatwood* did not really hold that a release from the administratrix pursuant to a chancery court decree was not valid simply because there had been no determination of the cause of action "on the merits."

A review of the record in the *Cheatwood* case reveals that this is exactly what happened. This writer has studied the pleadings, testimony, briefs, decisions and judgments of the district court, and the record and briefs filed in the court of appeals. All reflect the following sequence of events.

Lifus Bradford was killed in a truck collision on March 29, 1960. On April 22, 1960, Maggie M. Bradford filed a wrongful death action against James Walter Cheatwood, et al. in the United States District Court for the Southern District of Mississippi, cause No. 1549. Lifus Bradford had no children and the plaintiff claimed to have been his common law wife, his widow and the sole party in interest having a cause of action under Section 1453. The answer of the defendants denied liability on the merits and also denied that the plaintiff was the widow of the decedent and entitled to bring a wrongful death action. The plaintiff's deposition was taken and revealed circumstances casting considerable doubt that she was in fact the lawful wife of Lifus Bradford. During a pre-trial conference, a settlement of $5,000 was suggested by the district judge and apparently all agreed. However, the defendant's counsel advised the plaintiff's counsel that they could not settle with the plaintiff, since they did not believe her to be the lawful wife of the decedent. It was agreed that an administrator of the decedent's estate would have to be appointed and settlement authorized by the Chancery Court of Forrest County, Mississippi.

Maggie M. Bradford petitioned the Chancery Court of Forrest County, Mississippi, in cause No. 20,394 for letters of administration alleging herself to be the lawful common law wife of the decedent. A decree was accordingly entered granting the petition and letters of administration issued. The administratrix petitioned the chancery court for authority to substitute herself, in her capacity as administratrix, as plaintiff in the pending federal court suit, Civil Action No. 1549, and a

decree was entered authorizing this substitution. The administratrix then filed a petition in the Chancery Court of Forrest County for authority to settle a doubtful claim. A decree was entered December 1, 1960, authorizing settlement of the wrongful death claim for $5,000 in accordance with the agreement previously reached at the pre-trial conference, plus $850 reimbursement to the workmen's compensation carrier.[43] This amount was paid and a full and complete release was executed by Maggie M. Bradford as administratrix. In addition, a "final judgment" was entered in Civil Action No. 1549 approving the settlement, discharging the defendants, and also discharging the compensation insurance carrier and employer from further liability under the Mississippi Workmen's Compensation Act.[44]

Two years later, Annie Plummer Evans, a sister of Lifus Bradford, deceased, filed an action against Cheatwood in the Circuit Court of Forrest County, Mississippi, for the recovery of damages on her own behalf and on behalf of unspecified collateral heirs of Lifus Bradford, for the wrongful death of Lifus. This action was removed to federal court.

The answer of the defendants included two affirmative defenses: (1) that the final judgment rendered by the district court in Civil Action No. 1549 was res judicata, and (2) that the release executed by the administratrix pursuant to chancery court approval constituted a full and complete settlement and satisfaction of the cause of action. In addition, liability was denied on the merits. The plaintiff filed pleadings including two separate motions to strike. The first motion was a motion to strike the plea of res judicata on the ground that the earlier suit, Civil Action No. 1549, had not been decided on its merits as required by Section 1453 and, consequently, did not bar the second action. The second motion was a motion to strike the defendants' plea of settlement and satisfaction because of fraud and collusion in obtaining chancery court approval.[45]

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[43] To cover funeral expenses and second injury fund payments, for which recovery was allowed by the Mississippi Workmen's Compensation Act, MISS. CODE ANN. § 6998-36 (1956).

[44] MISS. CODE ANN. § 6998-36 (1956) required approval of settlements by the court where a third party action was pending.

[45] In support, this motion affirmatively alleged the following facts on which it was based: that the settlement and chancery court approval "were procured by collusion and fraud between said administratrix, her attorney and attorneys for the defendants and the attorneys for their insurance carrier;" that the chancery court "was not fully advised of all rights, nor was said court fully advised of all facts concerning same, and that by reason thereof the appointment of said administratrix was fraudulent and collusive and was not made to administer said estate and handle said cause of action in good faith on behalf of the heirs and beneficiaries;" that the

The defendants filed a motion for summary judgment on the grounds that the defendants were entitled to judgment as a matter of law, based upon their two affirmative defenses of res judicata and settlement and satisfaction. By agreement, the motion for summary judgment and the plaintiffs' motion to strike these two defenses treated by the court as motions for summary judgment, were heard simultaneously. Testimony was taken solely on the issue of whether or not there had been a trial on the merits in the prior federal court case, Civil Action No. 1549. All parties conceded that there had been no trial on the merits, and that the case had been settled as a doubtful claim pursuant to approval of the chancery court. The testimony also showed that the defendants did not believe that Maggie Bradford was the lawful wife of Lifus Bradford. The defendants advised the plaintiffs' counsel they could settle only with a duly appointed administrator and upon approval of the chancery court. It was shown that the defendants knew of the existence of a number of collateral heirs who probably were interested parties under the statute and knew that no notice of any kind had been given to them concerning either the federal court suit or the chancery court proceeding. It was the defendants' position that notice to the collateral heirs was not necessary inasmuch as their settlement was with the administratrix, who was representing all parties in interest.

The district judge held that, although there had not been a hearing on the merits in the first federal court suit, Civil Action No. 1549, the requirements of Sections 607 and 1453 were fully met by the full hearing before the chancellor who authorized the settlement; therefore, he upheld the validity of the release, sustained the defendants' motion for summary judgment and dismissed the suit.[46] There was no testimony concerning the alleged fraud in securing the chancery court approval. The district judge made no findings concerning those allegations.

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settlement and chancery court approval were made and obtained "as a result of active collusion between the administratrix and the representatives of the defendants for the sole purpose of protecting the interest of said defendants with the intent being by amendment to the declaration as referred to, to cut off the rights of all parties under the Mississippi wrongful death statutes;" and that "the decree rendered by the chancery court authorizing settlement and release was procured by such collusion and fraud and was therefore invalid and constitutes no defense to this cause of action." [These allegations of fraud and collusion appear to be similar, in fact almost verbatim, to those alleged in *Keanum v. Southern Ry.*, 151 Miss. 784, 119 So. 301 (1928).]

[46] With deference, it is suggested that the court of appeals misinterpreted the district judge's opinion. He did *not* hold that the judgment in Civil Action No. 1549 was res judicata, nor base his action on such a holding. On the contrary, he expressly stated in his opinion that the prior case ". . . was not determined by a trial on the merits . . . . "

It appears that the decision in *Evans v. Cheatwood* was simply this: (1) the plea of res judicata, based on the final judgment in Civil Action No. 1549, was not well taken, since the case was not decided on its merits in that former action; and (2) with respect to the defendants' plea of settlement and satisfaction, the plaintiff's motion to strike, and its accompanying allegations of collusion and fraud, raised issues of fact concerning the validity of the release which should have been heard by the district court; consequently, there were issues of fact to be decided and summary judgment was not appropriate. Thus, the case was remanded for hearing of these issues. This was precisely the action taken by the Mississippi Supreme Court in *Keanum v. Southern Ry.*,[47] which held that the allegations of fraud contained in the plaintiff's replication were sufficient, if established, to have avoided the chancery court decree and release; therefore, the lower court should not have sustained the demurrer to the replication.

This analysis of the *Cheatwood* decision was substantiated by the action of the district court when the case was returned for trial. The district court entered a pre-trial order which overruled the defendants' motion for summary judgment, sustained the plaintiff's motion to strike the plea of res judicata, and overruled the plaintiff's motion to strike the plea of settlement and satisfaction. The order further stated the issue to be tried: "Was or was not the release and settlement effected pursuant to a valid decree of the chancery court authorizing such settlement so as to constitute a valid settlement, accord and satisfaction of the claim in suit?"[48]

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[47] 151 Miss. 784, 119 So. 301 (1928).

[48] The case was tried before the judge without a jury at the conclusion of which the judge dictated his opinion into the record. He first adjudicated the identity of numerous heirs at law of the decedent, being collateral heirs. Next, he made findings of fact on the merits of the case and found that both decedent and defendant driver were equally negligent and then awarded additional damages to the plaintiff. The opinion was totally silent on the issue of fraud or collusion in obtaining the first release and whether the previous release was, or was not, valid.

This opinion of the district judge raises still another question. If one of the issues to be decided was the validity of the release, why was that issue not decided? If the release had been valid, then no additional award of damages was authorized. The additional award could be made only if the release was invalid. Nevertheless, the court's opinion is totally silent on the validity of the release. The reason has been explained privately by one of the counsel involved in the second trial. Before the case was tried, counsel for the defendants and counsel for the plaintiff, Annie Plummer Evans, reached an agreement to settle the claim for an additional amount. Apparently, it was decided not to seek additional chancery court approval, but instead to present the case to the district court for "trial on the merits" and the judge was advised of the agreed settlement amount. (For a discussion as to the validity of this procedure, see Section I, *infra*.) Apparently, the judge advised counsel

I. Attempts to Settle by a Friendly Trial "On the Merits"

The provision in Section 1453 that a determination of the suit shall not bar another action unless the suit was "decided on its merits" has resulted in efforts to obtain decisions on the merits without a trial. For example, some attorneys contend that the hearing before the chancery court constitutes a trial on the merits which bars a subsequent action.[49] This position was taken in the briefs filed in the district court in the *Cheatwood* case. This position does not seem to be in accord with the announcement of the Mississippi Supreme Court. In *Keanum v. Southern Ry.*[50] the defendant took the position that the hearing before the chancery court for approval of the settlement constituted a trial on the merits. The supreme court held, however, that a proceeding in the chancery court for authority to settle was not a trail on the merits which may be pleaded in bar at a subsequent suit. In such case, the court said, it is the compromise settlement and release, not the prior adjudication, which will bar a subsequent suit.

Another method of obtaining a decision "on the merits" which has been suggested, and adopted, by some attorneys is to go through a "trial" of the wrongful death action, calling witnesses to testify both as to the negligent or wrongful cause of death and as to damages, but with the plaintiff testifying, or counsel announcing to the jury, that a compromise settlement had been made for a stated amount, which the plaintiff deemed to be fair and adequate damages, and requesting the jury to render a verdict for the agreed amount. The jury then retires and returns a verdict for the agreed amount. Judgment is entered for that amount, as if a traditional adversary trial had been conducted. It is respectfully suggested that this procedure does not constitute a trial on the merits and that a judgment thus obtained will not bar any parties in

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that he was not bound by the amount of the settlement and that if he decided the case on its merits he may award more damages, or less damages, or none. Apparently, however, the court did fix damages in the agreed amount and rendered judgment accordingly, which thereafter was paid. Examination of the chancery court file in the Matter of the Estate of Lifus Bradford, deceased, No. 20,394, reveals that there was no subsequent proceeding to obtain approval of the second settlement, but recites that the proceeds of the second settlement were disbursed directly to the heirs. The chancery court adjudicated the identity of some 22 heirs at law of Lifus Bradford, deceased, but does not indicate whether or not any of them were minors. If, in fact, all of them were competent adults and agreed, the second settlement probably did not require chancery court approval.

[49] This school of thought usually insists that the decree authorizing settlement contains an adjudication that the court conducted a "trial on the merits" or had a "full hearing on the merits."

[50] 151 Miss. 784, 119 So. 301 (1928).

interest not participating. This is especially true with with respect to minors, whether or not participating in the "friendly" trial.

In *McCraney v. New Orleans & N. E. R. R.*[51] it was made to *appear* that a trial on the merits had been conducted, including jury verdict, when in fact the case was not actually tried. The court's ruling, which set aside the judgment, was based upon fraud and the attorney's lack of authority to do that which he attempted to do. The court observed:

> It is not necessary in the present appeal to decide what effect it would have on the judgment rendered in the first suit, if it were shown that it was filed by the consent of authority of the widow, *if it was not in fact tried on its merits by the jury.*[52]

The supreme court in the *Sudberry*[53] case made it clear that an agreed judgment would not bar a subsequent action. The court said that, in order for a judgment to bar a subsequent action, there must have been a "judicial determination of the case on its merits—not merely an agreed judgment for a fixed sum . . . ."[54] Further, the court observed

> The statute, we believe, was designed to prevent one interested party from agreeing upon and collecting a sum of money, satisfactory to him, but not at all satisfactory to others, or to the merits of the case.[55]

Moreover, where the rights of minors are involved, the decision in *Union Chevrolet v. Arrington*[56] is clear. The chancery court is the superior guardian of minors. To make a compromise settlement binding on the minor, judicial approval must be upon a real, and not perfunctory or merely formal, hearing in the chancery court. A "friendly trial" is incompatible with this basic philosophy, and will not be binding on incompetents even where the agreed judgment is entered in the chancery court.[57]

While a "friendly trial" on the merits might be binding upon those adults participating in it, either through estoppel, or because they joined in the suit, or acquiesced in the settlement,[58] it is submitted that a judg-

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[51] 128 Miss. 248, 90 So. 881 (1922).

[52] *Id.* at 257, 90 So. at 882 (emphasis added).

[53] 106 Miss. 744, 64 So. 723 (1914).

[54] *Id.* at 753, 64 So. at 724.

[55] *Id.* at 753-54, 64 So. at 724.

[56] 162 Miss. 816, 138 So. 593 (1932).

[57] Estate of George Jones v. Culley, 242 Miss. 822, 134 So. 2d 723 (1961), where an agreed order of dismissal, reciting an amicable settlement, was set aside because it did not appear that the chancery court had conducted a full hearing to determine the rights of the incompetent.

[58] Rowe v. Fair, 157 Miss. 326, 128 So. 87 (1930).

ment in such a "friendly trial" cannot bind incompetents, or even absent adults who are not participants in the suit.

J. Recommendations for Valid Compromise Settlements

1. *Settlement with claimants who are sui juris*

Obviously settlement with claimants who have legal capacity to contract can be made directly with them, without court approval. Similarly, settlement may be effected with older minors whose disabilities of minority have been removed generally, or specially to permit settlement.

2. *Settlement with Guardians*

Settlement of claims held by minors or persons non compos mentis may be made with their duly appointed guardians under Sections 422 and 607. In such proceeding, it is recommended that:

(1) Petitions of guardians, to be filed in appropriate chancery court having jurisdiction,[59] should aver facts indicating that the claim is doubtful and cannot be readily collected, not merely conclusions.

(2) The hearing before the chancellor must be a real hearing, not a perfunctory or merely formal hearing, and sufficient facts should be developed, through actual testimony, so that the chancellor may make an independent, judicial determination that the claim is doubtful, that it is not readily collectible, and that the proposed settlement is adequate and in the best interest of the ward.

(3) The ward must be actually represented and protected at the hearing. The guardian, as well as counsel, should actually be present and support the petition before the chancellor, if possible.

(4) The guardian should be represented by independent counsel, not by defendant's counsel.[60]

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[59] Questions of jurisdiction are beyond the scope of this article. In discussing chancery court authorization for settlement by guardians or administrators, it is assumed that the court has jurisdiction to render the decree. Otherwise, the settlement would be of very doubtful validity. Caution should be exercised to insure a valid decree by a court of competent jurisdiction. These problems most frequently arise in those cases where there are nonresident minors holding claims arising from fatal accidents occurring in Mississippi.

[60] Although the court in Union Chevrolet Co. v. Arrington, 162 Miss. 816, 138 So. 593 (1932), stated that it was permissible for an attorney to represent both sides, provided he fully informs the chancellor, it is felt that this procedure has too much risk of misunderstanding, and it is recommended that the guardian and ward be represented by independent counsel who in good faith represents and protects the interest of the ward. Some parties object to incurring the expense of counsel, where

(5) Key witnesses who will give the full facts on behalf of the ward should be presented and heard, as well as witnesses who present the other side of the case and show the doubtful character of the claim. The hearing certainly may be conducted with more informality and greater dispatch than in an adversary jury trial. Nevertheless, a sufficient number of witnesses must be presented, heard and made available to the chancellor to insure a full and fair disclosure of the merits of the claim.[61]

(6) Assuming that the chancellor approves the settlement, the decree should make specific adjudications, not only that the claim is doubtful and cannot be readily collected and that it is adequate and to the best interest of the ward, but also as to the conduct of the hearing and showing that the interests of the ward were adequately protected, such as representation by independent counsel, testimony of witnesses on behalf of the ward, interrogation by the chancellor and participation by the guardian.

(7) Some record or memorandum of the proceeding should be made for future use, should the settlement ever be challenged. It is probably not necessary for the court reporter to record the proceedings, but at least counsel should immediately dictate a memorandum for his file, including names of witnesses and the substance of the facts, pro and con, presented to the court. For this purpose, and to be of assistance to claimant's counsel and to the court, the presence of defendant's counsel at the hearing may be advisable. However, he should not take an aggressive lead in the presentation.

3. *Settlement with Administrator*

In effecting settlement with the administrator of the decedent under Section 607, it is recommended that the same precautions and procedures set forth in the preceding paragraph relative to settlement with guardians be observed, especially if any of the heirs are minors, incompetents, or, if adults, are not actively participating in the settlement.

4. *Removal of Disabilities of Minority*

It is recommended that the same basic precautions set forth in

not already represented, and most chancellors are reluctant to require it. It is recommended in such cases that competent counsel be engaged by the claimant to review the file, advise the claimant, and appear on claimant's behalf; that the defendant agree to pay such counsel a reasonable fee for his time; and that the Chancellor be fully advised of this agreement.

[61] Some chancellors, probably due to the pressure of overcrowded dockets, are reluctant to take the time to hear any witnesses, but prefer to rely on the good faith and competence of claimant's counsel. It is recommended that counsel should, with deference, insist that sufficient testimony be presented to permit the chancellor to make an independent determination as to the propriety of the settlement.

paragraph 2 above should be followed when removing disabilities of minority. This is especially true when the removal is special and limited for the specific purpose of authorizing the settlement.

5. *Settlements where Some Claimants are Unknown or Cannot be Found*

The typical wrongful death claim involves the death of a husband and father who leaves a widow and one or more children, all of whom are well known and easily identifiable. Sometimes, however, as in the case of Lifus Bradford, the decedent leaves no wife or descendants; therefore, the claim for his wrongful death may be owned by a number of collateral heirs, some of whom may be unknown or cannot be found. Settlement with the known beneficiaries would not bind the unknown or absent beneficiaries. Moreover, settlement with some, but not all, beneficiaries may not be wise from a strategic standpoint. In such cases, the only feasible method of settlement appears to be settlement with the decedent's administrator upon chancery court approval under Section 607. In this situation, although not actually required by law, some additional precautions are indicated.

In the *Cheatwood* case, although it did not appear in the opinion of the court of appeals, a large part of the problem seems to have been that the administratrix who was appointed by the chancery court, while claiming to be the common law wife and sole beneficiary, was actually a stranger, not a relative of the deceased, and, therefore, not a beneficiary under Section 1453. The collateral heirs charged that she was a mere interloper and complained that they had been given no notice of her appointment and no notice of the petition for settlement of the doubtful wrongful death claim. Actually, notice to the collateral heirs of the appointment of the administratrix was not required. Mississippi Code Annotated § 525 (1942), the basic statute providing for grant of letters of administration, gives preference in appointment to relatives for only 30 days from the date of death. Thereafter, the court may grant administration "to any other suitable person." No requirement is made for notice to relatives of the deceased. Likewise, no notice is required or provided for in the case of petitions to settle doubtful claims by guardians or administrators under Sections 422 and 607. Nevertheless, lack of notice to the heirs may have had some psychological influence in the court's decision.

It would seem to be a wise precaution, therefore, to give some notice of the hearing to all known parties in interest so they may have an opportunity to be heard on the adequacy and propriety of the proposed

settlement. It is not suggested that it is necessary to summon them into court, or to publish notice for nonresident or unknown parties. Actually this may create more problems. The desired result could be accomplished by having a special order entered fixing the time and place of hearing and directing that notice of the hearing be sent by the clerk to each known party, possibly by certified or registered mail. While such a notice would not rise to the dignity of a summons, at least it would give actual notice which, as a practical matter, might bring all parties into the hearing or afford a basis for claiming that those not appearing and objecting had acquiesced in the settlement.[62]

At least one chancellor in the state has, on occasion, required that the identity of the heirs, and therefore the statutory beneficiaries of the deceased, be established by heirship proceedings under Mississippi Code Annotated §§ 1270 and 1271 (1956). While such a proceeding is not exactly an heirship proceeding, nevertheless, Sections 1270 and 1271 can be adapted to determine both the heirs at law and the persons who will take under Section 1453.

Conclusion

It seems clear that a wrongful death claim may be discharged in only two ways: (1) an actual, genuine trial on the merits, or (2) a voluntary settlement. If settlement is attempted with an administrator or guardian, precaution must be taken to insure validity of the settlement release. While the recommendations contained in this article may not be fool-proof, they should, if followed, insure valid settlement and tend to avoid cases like *Cheatwood.*

[62] In Rowe v. Fair, 157 Miss. 326, 128 So. 87 (1930), the supreme court said that the statutory requirement for a decision on the merits ". . . can have no application where all the parties interested . . . *join or acquiesce* in a settlement without a trial on the merits . . . ." *Id.* at 333, 128 So. at 89-90 (emphasis added).

REPRESENTING THE SUBSIDIZED HOUSING SPONSOR

*Thomas D. Bourdeaux**

I. Introduction

Nearly forty years have passed since Franklin D. Roosevelt described a third of the people of this nation as being "ill housed." The efforts of the federal government to achieve a favorable adjustment of this fraction have resulted in a plethora of programs designed to provide decent housing for our people, particularly for the poor and the elderly.

Initially, under the Housing Act of 1937,[1] the emphasis was on housing projects operated by local authorities. The governing boards were appointed by the local governments of the communities in which they were located. Such projects were generally successful in those Mississippi communities which took advantage of the opportunity afforded by the Act to relieve substandard housing conditions. Unfortunately, the stigma of "government housing" was attached to the projects.

In more recent years the emphasis has shifted so that current legislation encourages the development by nonprofit and limited dividend corporations of government financed, privately operated multi-family projects as well as the construction and sale by entrepreneurs of single-family dwellings to persons whose income and credit record prevent them from enjoying the benefits of regular home financing procedures. More recent legislation has been effective by making decent housing available for low-income groups and in attracting the private sector by providing risk capital.

The purpose of this article is to survey the mechanics of some of these programs from the standpoint of the attorney representing the private sponsor of a federal housing project. Particular reference will be made to Section 221(d)(3),[2] Section 235,[3] Section 236[4] and "leased housing"[5] programs of the National Housing Act.

Some references will be made to Section 23[6] of the Act. Section 221(d)(3)[7] is generally known as "rent supplement housing." Section

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[1] Housing Act of Sept. 1, 1937, ch. 896, 50 Stat. 888.

[2] 12 U.S.C. § 1715l (1970).

[3] 12 U.S.C. § 1715z (1970).

[4] 12 U.S.C. § 1701s (1970).

[5] 42 U.S.C. § 1401 et. seq. (1964).

[6] 42 U.S.C. §§ 1410, 1412b, 1422 (1964). See Housing & Urban Development Act of 1965, P. L. 89-117, 89 Stat. 451.

[7] 12 U.S.C. § 1715l (1970).

235[8] deals with home ownership by way of an interest supplement program. Section 236[9] provides for a rental program for low and moderate income families through an interest supplement device. Section 23[10] concerns itself with "leased" housing whereby additional units are privately constructed and leased to the local housing authority.

This article is intended to be nothing more than a basic introduction, or a primer, to the various programs which are discussed. If an attorney has a client interested in becoming involved in any of these programs, the attorney should establish and maintain intimate contact with officials of the Federal Housing Administration in regard to Sections 221,[11] 235[12] and 236[13] programs, and with officials of the Housing Assistance Administration (formerly Public Housing Administration), and the local housing authority in regard to its Section 23[14] project.

Rent Supplement

A multi-family housing project for low-income families may be constructed by a nonprofit corporation, a limited dividend corporation, or a cooperative housing corporation. A nonprofit corporation should be comprised of a membership which is broadly based. The members should be properly motivated and should recognize a continuing responsibility to the project after it is constructed and in operation. This continuing responsibility is not in terms of finances but contemplates a recognition of, and a willingness to fulfill an obligation in terms of human relationships to the tenants of the project, as well as a concern for the continued and efficient management thereof.

Before undertaking to organize a nonprofit corporation, the attorney for the sponsoring group and representatives of the sponsors would find it profitable to visit the state FHA office for an informal conference.

There are several things that should be kept in mind from the outset. First, the rent supplement program is not available in any community which does not have a "workable program." There are statutory limits to the per family unit cost. These range from $12,937.50 for one bedroom to $22,137.50 for four or more bedrooms, excluding exterior land improvements and assuming that the project is not the type that requires an elevator. The per family unit cost can be higher in elevator-

[8] 12 U.S.C. § 1715z (1970).
[9] 12 U.S.C. § 1701s (1970).
[10] 42 U.S.C. §§ 1410, 1412b, 1422 (1964).
[11] 12 U.S.C. § 1715l (1970).
[12] 12 U.S.C. § 1715z (1970).
[13] 12 U.S.C. § 1701s (1970).
[14] 42 U.S.C. §§ 1410, 1412b, 1422 (1964).

type structures.[15] It would be advisable to have a site in mind but not purchased, because any site must meet certain FHA requirements.

Assuming FHA encouragement at the initial informal meeting, it is appropriate to move forward on several fronts. The formal organization of the nonprofit corporation or the limited dividend corporation, depending upon the route to be travelled should follow the informal meeting.[16]

In preparing articles of incorporation care should be taken by the attorney to have before him FHA Form 32 for a nonprofit mortgagor or FHA Form 1731 for a limited distribution mortgagor. It is advisable to provide in the charter or bylaws for the automatic replacement of inactive members.

At this stage consideration also should be given to the employment of a consultant whose fees may be included in the FHA mortgage commitment.[17] The consultant can provide assistance in the preparation of the application, in the selection of a qualified architect, and in negotiations with him, in the selection of and negotiation with the contractor and lender, and generally provide some guidance as the sponsor makes its way through the labyrinth of the FHA regulations and forms.

There should be submitted to FHA its Form 3433 entitled "Request for Preliminary Determination of Eligibility as Non-profit Sponsor or Mortgagor." It should be borne in mind that a nonprofit mortgagor is defined in FHA regulations as follows:

> The mortgagor shall be a corporation or association organized for purposes other than the making of a profit or gain for itself or persons identified therewith and which the Commissioner finds is in no manner controlled by nor under the direction of persons or firms seeking to derive profit or gain therefrom.[18]

Once the eligibility of the sponsor is settled, it must be determined that the project is feasible. Before this can be done, the architect must be engaged and some preliminary plans developed. Aside from the obvious requirements of technical competence, it is helpful to have an architect who has a bit of gambling blood in him. At this stage no one can give any assurance that the project will ever be built, and certainly with nonprofit sponsors, there generally are no funds available to commit any fee to the architect. Of course, the same can be said of the lawyer.

The FHA has divided the process of filing an application for project insurance into three stages: (1) the request for feasibility analysis, (2) a request through an approved mortgagee for a conditional commitment,

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[15] 12 U.S.C. § 17151 (d) (3) (ii) (1970).

[16] *Id.*

[17] *Id.*

[18] *Id.*

(3) a formal application, through an approved mortgagee for a firm commitment. This three-stage process can be shortened if the sponsor has plans and exhibits in sufficient detail to permit processing for a firm commitment early.[19]

In order to be considered, a project must contain five or more units and may be detached, semi-detached, row houses or walk up, or elevator multi-family structures. Tenants must be low-income families and individuals who by virtue of their income are eligible for public housing, and who are either displaced by government action, sixty-two years of age or older, physically handicapped, living in substandard housing or whose dwelling was damaged or destroyed by natural disaster. "Substandard housing" for the purpose of determining tenant eligibility, is considered to be that housing which does not meet the requirements of a housing code adopted by the community in which the project is located.

Once the eligibility of the sponsor and the feasibility of the project are determined, the next step is the development of full architectural plans for the project. It is desirable to have selected a builder or contractor at this stage. Since the FHA regulates the profit which a builder can make, it is not necessary for the construction of the project to be let on competitive bids. It would be advantageous for the builder to be selected before the architect begins the working drawings and specifications, as frequently a competent builder, working closely with the architect, can make practical suggestions about materials and techniques which would serve the project well.

The FHA has staff members who are competent in the architectural and building fields, and who are available for consultation with the architect as the plans are developed. This is necessary to assure that the plans, as finally prepared, will meet FHA requirements.

At an early stage an FHA-qualified mortgagee should be selected, preferably, one experienced in the type of financing involved in these projects. The role of the FHA in the financing of the project is that it will insure the repayment of the loan which will be at the market interest rates for a term of up to forty years. The note and morgage are eligible for purchase from the mortgagee by either Federal National Mortgage Association (Fannie May) or Government National Mortgage Association (Ginny May). The loan may be "preclosed" so that construction costs may be borrowed from the same mortgagee as is the permanent financing. The FHA will insure construction advances.

Even though a sponsor is nonprofit, it must have access to some funds prior to the closing. Frequently, land for the project site must

[19] *Id.*

be acquired prior to closing, soil must be tested, some engineering work done, and the architect is entitled to a portion of his fee prior to closing. All of these items of expense are recoverable out of the loan because it will be for at least one hundred percent of the cost of the project. In many instances, included in the loan will be an additional two percent of the cost known as AMPO Funds (additional monies to make the project operable). These AMPO Funds may be used to defray such expenses as equipping the manager's office, paying a manager's salary prior to opening the project and a number of other similar items.

As the architectural plans and specifications are completed and submitted to FHA for approval, the attorney begins his preparation for the closing. It is desirable to have a preclosing conference with the FHA closing attorney who will be attached to the Regional Office of the Department of Housing and Urban Development.[20] If a conference with the regional attorney is not feasible, then a full set of the closing papers must be submitted to him by mail. Forms are supplied by FHA for most of these closing papers but not all. For example, it is required that written assurances from the municipality in which the project is located be obtained to the effect that the project conforms to the existing zoning ordinances of the community. Assurances that utility services are available to the project are required. A title insurance policy binder should be obtained prior to closing and representatives of the title insurance company will attend the closing to issue a title policy.

Finally, a date and time for closing is set. In Mississippi the closings are held at the FHA offices in Jackson. It is important to have in attendance, not only the officers of the sponsoring organization, but the builder, the architect, representatives of the title insurance company, representative of the builder's bonding company and the surveyor. The mortgagee's representative, of course, will be in attendance. The climactic moment of the closing is the endorsement by the FHA of the note which evidences the debt.

The closing is followed by a preconstruction conference held between the sponsor, FHA representative, the builder and all subcontractors. The contractor will have executed FHA Form 2403-A entitled "Contractor's Prevailing Wage Certificate," by which he certifies that he is familiar with the applicable wage determination decision of the Secretary of Labor, a copy of such certificate will be posted at a conspicuous place at the construction site and that all laborers will be paid at wage rates not less than those contained in the applicable wage

[20] *Id.*

determination decision of the secretary. The wage scale determination which is required on each project may be requested through the FHA.

As the construction commences and progresses, the builder, through the architect, will submit monthly requests for progress payments. Normally, the title insurance company will handle the disbursement of these funds for the mortgagee. The attorney for the sponsor, therefore, must expect each month to certify to the title insurance company before any of the progress payments are disbursed that the builder does not have any unpaid materialmen or laborers. In order to be able to make such a certificate the attorney takes from the builder the regular affidavit to the effect that all laborers and materialmen have been paid. He also examines the records of the chancery clerk's office to determine that no notices of construction liens have been filed.

Upon the completion of construction, the contractor's costs must be certified by an independent audit, and then, there is a final closing with the probable necessity for the re-execution of the security instruments to reflect accurately the final project cost figures and permanent loan amount.

Interest Supplement

Much of what has been written above in regard to rent supplement projects is applicable to interest supplement projects, so emphasis here will be on the differences.

Section 236 of the National Housing Act[21] provides for a program whereby interest costs on the development of a housing project for families of lower income which exceed one percent may be subsidized.

The fair market rental for each unit is calculated on the basis of operating the project with mortgage payments at the market rate of interest. A basic charge is also calculated on the basis of operating the housing project at the one percent interest rate. A tenant who cannot afford the market rental pays either the basic rental or twenty-five percent of his income, whichever is greater. In calculating income there may be deducted $300.00 for each minor in the family, the earnings of minor children, five percent of the gross income in lieu of computing actual amounts withheld for social security and other deductions, and any unusual or temporary income. In a 236 project, twenty percent of the units may be rented to tenants who are eligible to receive aid under a rent supplement program.

The section 236[22] program is designed primarily for families who

[21] 12 U.S.C. § 1715z(1) (1970).
[22] 12 U.S.C. § 1701s (1970).

are a step or two advanced on the economic ladder above those who are rent supplement candidates. The adjusted income for the interest supplement program cannot exceed one hundred thirty-five percent of the limits applicable to public housing locally. Substantially the same adjustments are made to the family income as are made for a rent supplement candidate family.

Another difference of particular significance is the lack of any requirement that the community in which a Section 236 program is initiated must have adopted a workable program or that the community governing body must have specifically approved the particular project as is required in the rent supplement program. This fact probably makes the development of the Section 236 project more attractive to the private investor than a rent supplement project.

The limited dividend corporation which serves as the sponsor for a Section 236 project as well as for a rent supplement project may obtain an FHA insured loan up to ninety percent of the project costs. The statutes leave it to the Secretary of the Department of Housing and Urban Development to define a limited dividend corporation and thereby set the return on investment permitted.[23] Currently this return is fixed at ten percent per annum.

Section 235 Home Ownership

On the periphery of the scope of this article, but worthy of brief mention, is the home ownership program for lower income families provided for under Section 235 of the National Housing Act.[24] This program provides for interest supplement for qualified families who purchase homes. The amount of the supplement could be as much as the difference between market interest and one percent per annum interest rate. The homes may cost up to $21,000.00 and may be built by private builders. The price of the house is determined by the regular FHA appraisal. The purchaser generally pays $200.00 down, of which $100.00 applies to the closing costs.

The amount of subsidy is the amount representing the difference between the total monthly payment of interest, principal, FHA insurance premium, taxes and hazard insurance, and twenty percent of the mortgagor's adjusted income, or the difference between interest, principle and mortgage insurance premium at the full market rate and interest and principal without mortgage insurance premium at a one percent rate, whichever is less. Again the income limitation is one hundred

[23] 12 U.S.C. § 17151(d)(3) (1970).
[24] 12 U.S.C. § 1715z (1970).

thirty-five percent of the income limit for admission to public housing in the community.

This particular program has received adverse publicity in other parts of the country because of lax FHA appraisal and inspection procedures. The writer has closed several of these loans and believes the program, properly administered, is worthwhile. It provides an economic boost by creating an otherwise untapped market for new house construction aside from its obvious sociological advantages.

The closing of these loans is very similar to closing any regular FHA insured loan.

Leased Housing

Another fairly recent program is authorized under Section 23 of the National Housing Act.[25] This program provides the means by which private developers, either profit or nonprofit, may construct a project, then lease it to the local public housing authority for use as additional low-rent public housing units. The program is designed to enable and encourage private real estate interests to participate more directly in meeting the housing needs of low-income families. Under the provisions of Section 23, the Department of Housing and Urban Development contracts with local housing authorities to lease dwellings already in existence, or to be constructed, from private owners and sublease them to low-income families at low rentals.

Once a survey conducted by the appropriate regional office of HUD has determined the need for additional public housing rental units, HUD provides the local housing authority with an annual contributions commitment by which HUD obligates itself to make a single annual contribution for each unit to be leased. After obtaining this commitment from HUD, the local housing authority may enter into an agreement with the developer to lease dwellings which the developer will construct.

One cautionary note—the United States Housing Act of 1937[26] confines the leasing program to "existing structures"; therefore, there can be no specific commitment of annual contributions until the dwellings have been constructed. The local authority, whose powers are determined by state law, can enter into an agreement to lease the units in advance of construction. The agreement to lease, in the form of a proposed lease agreement, which is executed when all of the housing units are ready for occupancy, must be approved by the appropriate regional office of HUD.

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[25] 42 U.S.C. § 1421b (1970).

[26] Housing Act of Sept. 1, 1937, ch. 896, 50 Stat. 888.

CONCLUSION

Subsidized housing in whatever form it may assume, like subsidized farming, has been with us for a long time. There is no reason to expect that it is going away any time soon, regardless of the direction of political winds.

The general practice or the real estate lawyer, therefore, may reasonably expect to encounter some form of subsidized housing in his practice.

The most important single point for the reader to remember is to establish a good close working relationship with the Federal Housing Administration and its personnel. Many hours of frustration can be saved by doing this. It is important to remember, however, that while FHA personnel have been found to be most cooperative and willing to make suggestions on procedures for solving specific problems, they have very limited authority to waive or bend any regulations; therefore, little is accomplished by telling the FHA attorney at closing that some particular requirement has been previously and informally waived.

STUDENT COMMENTS

THE EXCLUSION OF ARTIFICIAL WATER HAZARDS FROM THE ATTRACTIVE NUISANCE DOCTRINE

> [W]hen a decision and the reasoning to sustain it retrogresses to the *laissez faire* philosophy of the Industrial Revolution, an appeal . . . should be made 'to the brooding spirit of the law, to the intelligence of a future day.'[1]

I. Introduction

A. *The Water Hazard Exclusion*

The only duty imposed upon a landowner with respect to trespassers is to refrain from willful and wanton conduct.[2] In order to circumvent the inequitable results of this limited duty, some courts have carved an exception when the trespasser is a young child. This deviation has been denominated as the turntable or attractive nuisance doctrine.[3] The child is said to have been enticed upon the premises by a condition or object possessing a probability of harm to him.[4]

Jurisdictions embracing this doctrine require as a prerequisite to its application the inability of the child to comprehend or appreciate the danger which attracted him onto the premises.[5] As a result of this essential element, certain species of dangers, which any child was held to appreciate and understand, were judicially excluded from the attractive nuisance doctrine at an early date.[6] The classification which has been most often excluded is that of drowning in artificial water hazards.[7] This genre is excluded in Mississippi in the application of the attractive nuisance doctrine.[8]

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[1] Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632, 635 (1950) (dissenting opinion). The impetus for Chief Justice Emmert's dissent was the majority's refusal to extend the attractive nuisance doctrine to water hazards. An eleven-year-old drowned in an excavation which was located in a neighborhood inhabited by a large number of children.

[2] Westmoreland v. Mississippi Power & Light Co., 172 F.2d 643 (5th Cir. 1949).

[3] W. Prosser, Law of Torts § 59, at 372 (3d ed. 1964) [hereinafter cited as Prosser].

[4] *Id. See generally* 65 C.J.S. *Negligence* § 63(71) (1966).

[5] 2 F. Harper and F. James, Law of Torts § 27.5 at 1455 (1956) [hereinafter cited as Harper and James]; Prosser, *Trespassing Children*, 47 Calif. L. Rev. 427 (1959) [hereinafter cited as Prosser, *Trespassing Children*].

[6] Prosser § 59, at 379.

[7] *Id.* at 380. Other dangers which have been categorized are fire, falling from heights, moving vehicles, ordinary visible machinery in motion, sliding or caving soil, piles of lumber, crossties and other building materials.

[8] *See* 31 Miss. L.J. 109 (1959); 29 Miss. L.J. 355 (1958).

Today a new type of water hazard, which was not a menace at the time these arbitrary categories were established, exists. This is the residential "backyard" swimming pool. Faced with the issue of whether the attractive nuisance doctrine should be extended to encompass swimming pools, Justice Inzer, in *Gordon v. C.H.C. Corp.*, stated "it is clear . . . that under the law of this state the attractive nuisance doctrine does not extend to swimming pools."[9] The purpose of this article is to explore the law culminating in the *Gordon* decision, the feasibility of such a rule in light of twentieth century ideals, and emerging trends found in other jurisdictions.

B. *Evolution of Child Trespass Law*

The precursor of child trespass law was the English case of *Lynch v. Nurdin*.[10] Recovery was allowed for injuries received by a six-year-old while playing on a cart hitched to a horse, which the defendant's servant left unguarded in the street. This decision was accepted in the United States in *Sioux City & Pac. R.R. v. Stout*.[11] A young child was injured while playing on an unguarded and unlocked turntable. Holding the railroad company liable for not taking adequate precautions, the Supreme Court of the United States invoked what was soon to become a most controversial concept of liability.

Stout did not attain universal acceptance in all states. Some jurisdictions felt the decision had no logical basis or legal merit. Many of these states were industrial and apparently feared that the rule would impede the promotion and expansion of commerce.[12] In other states, courts were not apprehensive of the consequences of enlarging the traditional duty of a landowner toward child trespassers.

In *Keffe v. Milwaukee & St. P. Ry.*[13] the doctrine was invoked on the basis that the child was allured onto the defendant's premises by the turntable. A resulting duty, based on foreseeability of harm, thus arose to protect children from the dangers of temptation placed before them.

During the early stages of the doctrine controversies emerged.

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[9] 236 So. 2d 733, 735 (Miss. 1970).

[10] 1 Q.B. 29 (1841). *See* Prosser, *Trespassing Children, supra* note 5, at 430 where it is stated that the English courts do not utilize the attractive nuisance doctrine but do allow some qualified protection to trespassing children on the basis of being an implied licensee. *See also* 65 C.J.S. *Negligence* § 63(71) (1966) for a brief discussion of Lynch v. Nurdin.

[11] 84 U.S. (17 Wall.) 657 (1873).

[12] HARPER AND JAMES § 27.5, at 1448.

[13] 21 Minn. 207 (1875).

United Zinc & Chemical Co. v. Britt[14] was a predominant factor in originating the furor. The Supreme Court of the United States refused to allow recovery when two children were poisoned by a pool of water which had accumulated in the basement of a partially demolished building. The thrust of the decision was that in order to invoke the doctrine as a means of recovery, the child must be induced to enter the land by the attractive object which in fact causes the injury. The impact of *Britt* was shattered in *Best v. District of Columbia*.[15] Recovery was allowed when a five-year-old fell through a hole in a wharf and drowned. Remnants of *Britt*, however, unfortunately persist today.[16]

II. Mississippi Non-water Hazard Cases

The reasoning of *Stout* was incorporated into Mississippi jurisprudence in 1887.[17] A six-year-old fell from the side of a hill. Dirt removed from the hill had been deposited at the rear of the child's residence in a manner which allowed the youngster to leave his backyard. A path was constructed from the backyard to the point of danger. In holding that the issue of liability was for the trier of fact, the court stated:

> If the defendant by the exercise of reasonable forethought could have anticipated the probability of the child's action it should have guarded against the danger by removing the earth or obstructing the pathway. If it failed so to do, it failed in a duty which rested upon it, and is not relieved from responsibility even though the child was a trespasser in going upon the premises.[18]

In *Spengler v. Williams*[19] the defendant had placed a pile of lumber in the street. A seven-year-old playing there was killed when an improperly stacked pile fell on him. The defendant contended that the plaintiff had failed to establish by specific proof that he knew the lumber would attract children. The court responded:

> All persons are supposed to know the curiosity of children, and their disposition to play around and about objects of unusual appearance: no court would permit a verdict to stand

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[14] 258 U.S. 268 (1922).

[15] 291 U.S. 411 (1934).

[16] Miller v. Perry, 308 F. Supp. 863 (D.S.C. 1970); Denver Tramway Corp. v. Garcia, 154 Col. 408, 390 P.2d 952 (1964); Indianapolis Motor Speedway Co. v. Shoup, 88 Ind. App. 572, 165 N.E. 246 (1929); McCormick v. Williams, 194 Kan. 81, 397 P.2d 392 (1964); Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So. 2d 791 (1949); Shemper v. Cleveland, 212 Miss. 113, 54 So. 2d 215 (1951); Holifield v. Wigdor, 361 Mo. 636, 235 S.W.2d 564 (1951); Gouger v. Tennessee Valley Authority, 188 Tenn. 96, 216 S.W.2d 739 (1949).

[17] Mackey v. City of Vicksburg, 64 Miss. 777, 2 So. 178 (1887).

[18] *Id.* at 783, 2 So. at 180.

[19] 67 Miss. 1, 6 So. 613 (1889).

> which rested upon the denial of such instincts in children, or excused the negligence of the defendant because of the want of specific evidence that he possessed that common knowledge which all men are assumed to have.[20]

The doctrine was held applicable when a ten-year-old came into contact with an uninsulated wire passing through a tree.[21] Likewise, when a twelve-year-old caught his foot in an unlocked turntable the doctrine was found appropriate.[22]

Certain discernable elements arise from the non-water hazard cases. The hazard must be one that is artificially created.[23] Following *Britt, supra,* the trespassing child must be attracted onto the premises by the condition causing the injury.[24] For a danger to be legally attractive it must be "hidden to the inexperienced child."[25]

> [A] statement that any agency which is dangerous and attractive to children may constitute an attractive nuisance is entirely too broad, and leads to absurdities, for there is practically no limit to what may attract children.
>
> Accordingly, it is usually considered that in order that the doctrine may properly be applicable, the condition or appliance must be something unusual and which is of a nature rendering it peculiarly or unusually attractive or alluring to children.[26]

When the child has received an effective warning to avoid the danger, even though it is an unusual one, application of the doctrine will be precluded.[27] The warning must necessarily be one which the child both understands and appreciates. This will depend on the circumstances presented to the court such as the age of the child and his ability to understand the warning.[28]

III. Water Hazards— What Are the Special Circumstances?

A. Ponds, Vats, and Bar Pits

Thompson v. Illinois Cent. R.R.[29] was the first Mississippi case urging the application of the attractive nuisance doctrine to impounded

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[20] *Id.* at 4, 6 So. at 614.

[21] Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874 (1907).

[22] Dampf v. Yazoo & M.V.R.R., 95 Miss. 85, 48 So. 612 (1909).

[23] McComb City v. Hayman, 124 Miss. 525, 87 So. 11 (1921).

[24] Shemper v. Cleveland, 212 Miss. 113, 54 So. 2d 215 (1951).

[25] Salter v. Deweese-Gambill Lumber Co., 137 Miss. 229, 240, 102 So. 268, 270 (1924).

[26] Bonhomie & H.S. Ry. v. Hinton, 155 Miss. 173, 177-78, 124 So. 271, 271-72 (1929).

[27] Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).

[28] *Id.*

[29] 105 Miss. 636, 63 So. 185 (1913).

water. It appeared before the Mississippi Supreme Court in 1913. A railroad company constructed a dam across the natural drainage of some land forming a lake. The fact that children frequented the area to wade and swim was known to agents of the company. The lake was located in a wooded area about half a mile from a residential portion of McComb, and it was claimed that a public pathway passed along the lake. A nine-year-old boy waded some two hundred and fifty feet into the water before he stepped into a deep hole and drowned.

The plaintiff contended that the pond constituted an attractive nuisance to children and the company was under a duty to either fence the area or employ a watchman to prevent children from wading. The earlier decisions allowing recovery on the attractive nuisance theory regarding non-water hazards were found inapplicable to water hazards.[30]

> We think it must be conceded that this deplorable tragedy could not have been anticipated as probable by the exercise of reasonable forethought, nor could it have been prevented by any reasonable precautions. Of course, one could have anticipated the possibility of this sad event; but we think the danger was comparatively remote.[31]

Policy considerations appeared compelling to the court. The lake was deemed to contain the same inherent dangers and attractions found in natural bodies of water. The reqirement of eliminating those dangers was felt to be so great as to impose "intolerable" burdens upon landowners.

> Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed.[32]

In *Vincent v. Barnhill*[33] the theory enunciated in *Thompson* was reaffirmed. A seven-year-old boy was found drowned in a concrete vat which had accumulated rain surface water. The vat, visible from surrounding highways, was adjacent to an area where children frequently played. The lower court's refusal to direct a verdict for the landowner was reversed.

Since there was no evidence of any prior drownings in these vats,

[30] Temple v. McComb City Elec. Light & Power Co., 89 Miss. 1, 42 So. 874 (1907) (absence of any extraordinary dangerous agency—electricity); Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889) (the danger was not located in a populous thoroughfare); Mackey v. City of Vicksburg, 64 Miss. 777, 2 So. 178 (1887) (no allurement from the child's residence).

[31] 105 Miss. at 651, 63 So. at 186.

[32] *Id.* at 652, 63 So. at 187.

[33] 203 Miss. 740, 34 So. 2d 363 (1948).

there was only a possibility that such would occur. The opinion made it explicit that a landowner was not to be subjected to liability when he neglected to prevent those dangers labeled "possible" as distinguished from those labeled "probable."[34] Utility considerations were again deemed to be the dominant factor. The court was not willing to subject a possessor of land to liability for maintaining impounded water on his premises. Children drown in ponds and lakes each year, yet the total of these tragedies is negligible when compared to the number of persons visiting these areas. The costs of eliminating dangers attributable to impounded water outweighed the number of resulting drownings. Pools and ponds were held not to be attractive nuisances unless there are *extraordinary circumstances* arising from the peculiar facts of each case.

The validity of the doctrine of attractive nuisance appeared to be under attack in *Vincent.* The court noted that it should be applied cautiously. Reference was made to the reasons causing some jurisdictions to entirely reject the doctrine:

> [I]t has its foundation on sympathy rather than on any sound principle of law, impairs property rights, imposes on every member of the community a higher duty for the protection of children than is imposed on their parents, and if carried to its logical conclusion would amount to practical insurance of children and make the ownership of the property unduly unsafe . . . .[35]

An early established policy was reiterated:

> Although we have elected to align ourselves with that group of states which has adopted the attractive nuisance doctrine, *we have declared our tendency to limit rather than expand its application.*[36] (emphasis added).

It is worthy of observation that the court refused to recognize the playground rule[37] as a corollary to the attractive nuisance doctrine to impose liability upon the landowner.

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[34] Requiring a probability of harm is one method of protecting the landowner's immunities. This is said to have "paved the road" for courts to create certain categories as being outside the coverage of the doctrine. It is "a vestigal trace of the landowner's special privileges, not destined to endure long." HARPER AND JAMES § 27.5, at 1457.

[35] 203 Miss. at 748, 34 So. 2d at 364.

[36] *Id.* at 749, 34 So. 2d at 365. The tendency to limit the doctrine was first announced in Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).

[37] 203 Miss. 740, 34 So. 2d 363. Under the playground theory, which is in substance a facsimile of the traditional attractive nuisance doctrine, a landowner is charged with liability when he has actual knowledge that children are using his premises as a playground. This position is rationalized on the ground that the possessor should be responsible for dangers which he knowingly exposes to young children. Gatlinburg Constr. Co. v. McKinney, 37 Tenn. App. 343, 263 S.W.2d 765

Two questions were left open after the *Vincent* decision: (1) would the attractive nuisance doctrine be applied in any future case involving non-water hazards? and (2) what "extraordinary circumstances" might extend the doctrine to impounded water?

These questions remained unanswered in *McGill v. City of Laurel.*[38] A six-year-old boy drowned while swimming in a barrow pit containing marine life, swimming equipment, and floating timber. The pit was alleged to be easily accessible, near traveled pathways and streets, and in a residential area where children resided. The defendants were claimed to have known that children played around the bar pit. It was further alleged that the pit constituted a trap, since a child could only seek egress by scaling perpendicular walls on the opposite side after entering the water.

The declaration was found insufficient to state a cause of action based on the attractive nuisance doctrine. Adverting to *Thompson* and *Vincent, supra,* the court found no extraordinary circumstances to justify the imposition of liability upon the defendants. It was indicated, however, that if some distinguishing factors surrounding the circumstances had been present, the declaration would have been sufficient to withstand an attack by way of demurrer.

McGill illustrates what elements must be present in order to invoke the doctrine.

(1) An unusual or attractive condition must be maintained upon the premises.

(2) The danger must be latent.

(3) Trespassing children must not be able to comprehend or perceive the danger.

(4) The owner must have knowledge of child trespassers.

(5) Proximate causation must exist between the dangerous condition and the ensuing injury.

(6) The attractive object must be in close proximity to a path or street.

(7) Ownership and control over the premises must be in the party sought to be charged.

(8) The burden of precautions to eliminate the danger must not be unreasonable.

(1953). Recovery has been allowed for drownings in the jurisdiction which employs this rule as an exception to the traditional duty owed to trespassers. Williams v. Town of Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (1949).

[38] 252 Miss. 740, 173 So. 2d 892 (1965).

Each of these elements was found absent. The reasoning of the court seems questionable. The pit was not legally attractive because the Mississippi Supreme Court has held that the doctrine does not include water hazards. No latent danger was present because water itself is considered to be a patent danger. All children, no matter how young, are held to realize and appreciate this danger by experience and instinct. Proximate causation was lacking since the evidence indicated the child drowned due to his swimming inability rather than his playing on the floating timber or searching for marine life.

Proof of proximity was absent by the failure of the appellants to show that the pit was visible from roads or paths near the area. In addition, there was no indication that the child was attracted from an area where he had a legal right to be. The supreme court alluded to a statement contained in *Vincent, supra,* saying that if a path did in fact exist there was no consent for the child to enter the premises. Thus, in order to fulfill the proximity element, the child must be attracted from an area where he has a legal right to be. If he enters the land and follows a path to the danger, the requirement of proximity is thereby negated since the child remains a trespasser once he has entered the premises.

Finally the utility of safeguarding the premises by erecting a fence or providing a watchman was deemed unwarranted:

> We take judicial knowledge of that which is commonly known. There are countless thousands of cattle and fishing ponds, swimming holes, sink holes, creeks, lakes, natural and artificial, swamps, bayous, and other bodies of water, large and small, which dot and cover the farms, forests and open lands of this state. Therefore, to sustain the appellants' contention herein would be tantamount to holding that the owners of land . . . are the insurers of the safety of children . . . . Wisdom, the disciple of experience, advocates the extension of a rule of law only so far as reasonable necessity requires.[39]

It is apparent that the court used *McGill* to reaffirm the position that the attractive nuisance doctrine is not to encompass water hazards.

B. *Swimming Pools*

In *Gordon v. C.H.C. Corp.*,[40] a ten-year-old drowned in a motel pool located approximately one hundred feet from the highway. Standing by the unfenced, unguarded pool, the youngster was asked if he could swim. After giving an affirmative answer, he jumped off the diving

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[39] *Id.* at 764, 173 So. 2d at 903.

[40] 236 So. 2d 733 (Miss. 1970).

board and drowned. The peremptory instruction given to the jury to find in favor of the motel was affirmed.

To be consistent with *Thompson, Vincent,* and *McGill, supra,* a modern swimming pool was said to be no more attractive than a pond or lake.

> It is not the attractiveness of the swimming pool or the lights in the water that attract children but the impounded water itself, be it creek, pond, lake, bar pit or a fancy swimming pool.[41]

It was again emphasized that no extraordinary circumstances were present to necessitate the imposition of liability. The danger was open and apparent, and the child had attained an age to appreciate and understand the risks.

C. *Evaluation of Mississippi Cases*

The conservative posture of the Mississippi Supreme Court in excluding impounded water from the attractive nuisance doctrine has been criticized.[42] Yet it cannot be said that there is no merit in this position. The right of the property owner to use his property as he desires is certainly a legitimate interest to protect. There is a prodigious amount of impounded water within the borders of this state. An abundance of such water is used in both agriculture and industry, which are vital organs of our economy. It has also been asserted, somewhat questionably, that to allow recovery would place a premium on the neglect of the parental duty.[43] The results would make property owners insurers of the lives of wandering and inquisitive children.[44] Landowners should be able to assume that parents will prevent their children from trespassing on land containing common dangers or at least not let them encounter such dangers without being properly accompanied.[45]

The ages of the children in each of the Mississippi cases have been nine, seven, six and ten. It seems that it can be legitimately argued that some of these children were capable of understanding the danger of drowning. But it seems to be a legal fiction to say that these children could instinctively comprehend the visible danger of water hazards. The court continues to speak of "extraordinary circumstances" which might afford recovery on the basis of attractive nuisance. However, the facts presented in *Thompson, Vincent, McGill,* and *Gordon, supra,* have

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[41] *Id.* at 734.

[42] *See* HARPER AND JAMES § 27.5, at 1456; Prosser, *Trespassing Children, supra* note 5, at 458.

[43] McGill v. City of Laurel, 252 Miss. 740, 173 So. 2d 892 (1965).

[44] Vincent v. Barnhill, 203 Miss. 740, 34 So. 2d 363 (1948).

[45] Staley v. Security Athletic Ass'n., 152 Col. 19, 380 P.2d 53 (1963).

failed to indicate what special circumstances would lead the court to extend the doctrine to water hazards. These cases can only be rationalized on a policy basis.

IV. Current Trends

A. *Humanitarian Doctrine*

A growing number of courts have rejected the arguments propounded for characterizing a category of dangers as being beyond the ambit of the attractive nuisance doctrine. These jurisdictions have realized the unworkability of these arbitrary categories.[46] The common nature of the water hazard should not prohibit recovery where the child does not, in fact, realize the danger. Even though parents have a duty to protect and safeguard their children, it is not feasible for them to keep their children "chained to a bedpost."[47]

> The community has an interest in the life of a child. The preservation of that life is a proper factor to be weighed against a landowner's right to the exclusive possession of his land and the use he makes of it. Conduct which unreasonably jeopardizes that life is offensive to our society and the fact that the child is a trespasser is only one of the elements to be weighed by the jury in its historic scales.[48]

It is stated that landowners will be more careful when charged with responsibility. Children, on the other hand, will not change their natural propensities by precluding recourse against the possessor. To alleviate the problem, logical policy considerations dictate that the burden be placed upon the landowner.[49]

> [O]ccupants may know little about the law, but children know nothing about it, and children will play where they can.[50]

B. *The Restatement*

Embodying the concepts of the "humanitarian doctrine," the *Restatement (Second) of Torts* § 339 appeared in 1965.[51] This pronounce-

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[46] *See, e.g.*, Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967); King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959); Pocholec v. Giustiana, 224 Ore. 245, 355 P.2d 1104 (1960); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 483 (1948).

[47] Prosser § 59, at 372.

[48] Lyshak v. City of Detroit, 351 Mich. 230, 244, 88 N.W.2d 596, 603 (1958).

[49] Hankins v. Southern Foundation Corp., 216 F. Supp. 554 (D.D.C. 1963).

[50] Eastburn v. Levin, 113 F.2d 176, 178 (D.C. Cir. 1940).

[51] Restatement (Second) of Torts § 339 provides:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
(a) the place where the condition exists is one upon which the possessor

ment contains a marked similarity to its progenitor.[52] Under the *Restatement,* liability is considered separate and distinct from the attractive nuisance doctrine and is part of the general law of negligence.[53] Thus the duty of reasonable care not to inflict foreseeable harm is required of the possessor of land.[54] There is no requirement of attractiveness or allurement onto the land by the object or condition that causes the injury.[55] However, the elements of attractiveness[56] and proximity[57] of the dangerous condition still retain significance in that they shed light on whether the landowner might reasonably anticipate that children will trespass.[58]

Knowledge continues to play an all-important role in the *Restatement* as in the traditional concept of attractive nuisance. A standard of flexibility is, however, provided. The landowner needs only to know or have reason to know that children are likely to trespass. Reason to know has been interpreted as whether the landowner has information of a condition existing on his premises that would be dangerous to trespassing children.[59] There is no duty imposed upon the possessor to make an investigation to determine if children are trespassing.[60]

The landowner must know or have reason to know that the condition upon his premises will be harmful to children that may invade his

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knows or has reason to know that children are likely to trespass, and
(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

[52] RESTATEMENT OF TORTS § 339 (1934). *See* HARPER AND JAMES § 27.5, at 178 (Supp. 1968) for additions and deletions which have been made in the text of RESTATEMENT (SECOND) OF TORTS § 339 (1965).

[53] RESTATEMENT (SECOND) OF TORTS § 339, comment *b* at 198 (1965); [hereinafter cited as RESTATEMENT].

[54] *Id.*

[55] Pocholec v. Giustiana, 224 Ore. 245, 355 P.2d 1104 (1960); RESTATEMENT § 339, comment *b* at 198.

[56] Reynolds v. Wilson, 51 Cal. 2d 94, 331 P.2d 48 (1958); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 483 (1948).

[57] Robertson v. Centennial Properties of Austin, Inc., 392 S.W.2d 577 (Tex. Civ. App. 1965); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

[58] HARPER AND JAMES § 27.5, at 1451.

[59] Gagnier v. Curran Constr. Co., 151 Mont. 468, 443 P.2d 894 (1968).

[60] Miller v. Perry, 308 F. Supp. 863 (D.S.C. 1970); RESTATEMENT § 339, comment *g* and *h* at 201.

land. The intent of the *Restatement* is to prohibit its application to hazards that are apparent and to risks that should be appreciated.[61] The latent danger standard is by no means rigid. When the child is too young to understand the danger and the possessor knows that such children may trespass, liability may arise.[62]

> [A] submissible issue of fact exists for the jury as to sections (b) and (c) . . . where: (1) the trespass was in an area known to be frequently used by children, and (2) the attraction involved creates a distraction of the actual danger to the extent that it is not fully appreciated by the child, notwithstanding the fact that (3) the structure itself did not contain a latent condition.[63]

A subjective test is thus provided in clause *c* in contrast to the objective test in clause *b*.[64]

There seems to be an increasing tendency among jurisdictions using the *Restatement* to find that water hazards do not contain open and obvious dangers to children.

> Any time children of tender years who cannot swim, play unattended by adults, near an unguarded pond which is beyond their depth, they engage in an extremely dangerous pastime.[65]

Section 339 continues the basic requirement of utility. This is in essence a balancing process giving due consideration to the right of the possessor to use his property and, on the other hand, the interference with this right in eliminating the danger. A material inquiry of utility involves the use made of the property and the cost that would be incurred in providing safeguards.[66] Liability will not be imposed if the expense and attendant burdens upon the owner are undue.[67] The question of utility is an issue of fact.[68]

A detailed inquiry of the utility element was conducted in *Pocholec v. Giustina*.[69] A six-year-old drowned in a log pond. The lower court

[61] *See* RESTATEMENT § 339, comment *i* at 202, comment *j* at 203, comment *m* at 204.

[62] RESTATEMENT § 339, comment *j* at 203.

[63] Cargill, Inc. v. Zimmer, 374 F.2d at 930 (8th Cir. 1967).

[64] *Id.*; *see also* O'Keefe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966).

[65] Robertson v. Centennial Properties of Austin, Inc., 392 S.W.2d at 583 (Tex. Civ. App. 1964).

[66] RESTATEMENT § 339, comment *n* at 205; PROSSER § 59, at 383-84.

[67] Prosser, *Trespassing Children*, *supra* note 5, at 465.

[68] *See* Note, *Trespassing Children: A Study in Expanding Liability*, 20 VAND. L. REV. 139 (1966). The author submits that leaving this issue to the jury opens the door for abuse and that it is unlikely this issue receives a full consideration from the trier of fact.

[69] 224 Ore. 245, 355 P.2d 1104 (1960).

excluded evidence as to the costs required to erect a fence around the pond. The Court held that the cost of fencing was relevant to show one feasible method to minimize the danger of drowning. However, the cost of fencing was not itself determinative of feasibility. This issue includes not only the cost of providing a barricade, but the use made of the premises. The cost may not be high to construct a fence; yet it may be infeasible in the particular manner to which the land is being used. There must be evidence that a fence will not impair the practicable use of the land.

Clause *e* of the *Restatement* imposes liability upon the landowner only if he has failed to adapt his conduct to that of a reasonable man under the same or similar circumstances.[70] When the possessor has conformed to this standard he will not be liable for injuries sustained by children who may be injured by the dangerous condition upon his premises.[71] Cases which have been resolved under the *Restatement* indicate that reasonable care includes the maintenance of an effective barricade surrounding a backyard swimming pool.[72]

C. *Mississippi and the Restatement*

In *Gordon*, the appellant's request that the court reconsider its prior decisions in light of *Restatement (Second)* § 339 was rejected. The court noted that even if § 339 were adopted, the facts of the case did not come within the purview of its language. Using the comments as a guide to interpretation, the Court said:

> [T]here are many dangers such as those of fire and water or falling from a height, which under ordinary conditions may be reasonably expected to be fully understood and appreciated by any child old enough to be allowed at large. To such conditions the provisions of Section 339 . . . are not applicable in the absence of other factors creating a special risk, such as the fact that the condition is so hidden that its danger is not readily visible or some distractive influence which makes it likely that a child will not discover or appreciate it.[73]

The case was decided on the grounds that the pool contained no latent perils and the child was able to perceive the danger.

This is a permissible interpretation in light of the age of the youngster. Yet other courts utilizing the *Restatement* give greater weight

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[70] *Restatement* § 339, comment *o* at 206.

[71] *Id.*

[72] Giacona v. Tapley, 5 Ariz. App. 494, 428 P.2d 439 (1967); King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959). *Cf.* Robertson v. Centennial Properties of Austin, Inc., 392 S.W.2d 577 (Tex. Civ. App. 1964).

[73] 236 So. 2d at 735.

to other factors such as the knowledge of the possessor, the location of the hazard, accessibility, and utility considerations. An occasional consideration of all these circumstances may indicate that the possessor should be charged with liability.[74]

D. *Summary*

The emerging trend is to reject any fixed classification of dangers as patent and to consider each case on its particular facts.[75] This is evidenced by eighteen jurisdictions following the *Restatement*.[76] Thir-

[74] *See, e.g.*, Giacona v. Tapley, 5 Ariz. App. 494, 428 P.2d 439 (1967); Robertson v. Centennial Properties of Austin, Inc., 392 S.W.2d 577 (Tex. Civ. App. 1964).

[75] PROSSER § 59, at 381.

[76] Taylor v. Alaska Rivers Navigation Co., 391 P.2d 15 (Alaska 1964); Giacona v. Tapley, 5 Ariz. App. 494, 428 P.2d 439 (1967) (five-year-old drowned in pool, surrounded by inadequate barricade, located in densely settled area); O'Keefe v. South End Rowing Club, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966) (denied recovery where sixteen-year-old struck his head on submerged object when he dove from defendant's pier), King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959) (one and one-half-year-old drowned in swimming pool); Wolfe v. Rehbein, 123 Conn. 110, 193 A.2d 608 (1937) (adopted RESTATEMENT § 339); Moran v. Delaware Racing Ass'n., 218 A.2d 452 (Del. 1966) [holding that if the defendant was liable it would be under RESTATEMENT (SECOND) § 335 or § 399]; Beaston v. James Julian, Inc., 49 Del. 521, 120 A.2d 317 (1956) (court used RESTATEMENT § 339 where a four-year-old drowned in an excavation); Louisville Trust Co. v. Nutting, 437 S.W.2d 484 (Ky. 1968) (three-year-old burned by a pile of smoldering leaves) [court followed RESTATEMENT (SECOND) § 339 and overruled earlier cases denying recovery from the same danger]; Magerowski v. Standard Oil Co., 274 F. Supp. 246 (W.D. Mich. 1967) [using RESTATEMENT (SECOND) § 339, an issue of fact was presented as to whether the defendant had been grossly negligent in failing to prevent trespassing children from entering his premises]; Doren v. Northwestern Baptist Hosp. Ass'n., 240 Minn. 181, 60 N.W.2d 361 (1953) (adopted RESTATEMENT § 339), *see also* Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947) (seven-year-old fell off unrepaired retaining wall and drowned); Gagnier v. Curran Constr. Co., 151 Mont. 468, 443 P.2d 894 (1968) [adopted RESTATEMENT (SECOND) § 339]; Caliguire v. City of Union City In County of Hudson, 104 N.J. Super. 210, 249 A.2d 603 (1967) [followed RESTATEMENT (SECOND) § 339]; Saul v. Roman Catholic Church, 75 N.M. 160, 402 P.2d 48 (1965) (court used RESTATEMENT § 339); Martinez v. C. R. Davis Contracting Co., 73 N.M. 474, 389 P.2d 597 (1964) (fourteen-year-old drowned in excavation located in thickly populated area); Mikkelson v. Risovi, 141 N.W.2d 150 (N.D. 1968) [adopted RESTATEMENT (SECOND) § 339]; Pocholec v. Giustiana, 224 Ore. 245, 355 P.2d 1104 (1960) (denied recovery where fourteen-year-old drowned in unfenced log pond); Cooper v. City of Reading, 392 Pa. 452, 140 A.2d 792 (1958) (falling through ice on pond which was located in residential area); Haddad v. First Nat'l. Stores, Inc., 280 A.2d 93 (R.I. 1971) [adopted RESTATEMENT (SECOND) § 339 and overruled prior decisions rejecting the attractive nuisance doctrine]; Robertson v. Centennial Properties of Austin, Inc., 392 S.W.2d 577 (Tex. Civ. App. 1965) (eight-year-old slipped on rock and fell into pond situated in community infested with children); Massino v. Smaglick, 3 Wis. 2d 607, 89 N.W.2d 223 (1958) (adopted RESTATEMENT § 339 but still requires an inherently dangerous condition or object notwithstanding clause *b*), *see also* Larson v.

teen states continue to place water hazards in a special category and afford recovery only when "special circumstances" are presented by the facts of each case.[77] In each of these states landowners have been held

Equity Cooperative Elevator Co., 248 Wis. 132, 21 N.W.2d 253 (1946) (complaint good against demurrer where nine-year-old fell off forebay wall and drowned in river); Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967) [for proposition that South Dakota would follow RESTATEMENT (SECOND) § 339], *but see* McCleod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946) (landowner under no duty to erect a barricade even though he knows children visit water hazards located on his premises).

[77] Brinkley Car Work & Mfg. Co. v. Cooper, 60 Ark. 545, 31 S.W. 154 (1895) (six-year-old scalded by walking into pit containing hot water), *but see* Jones v. Comer, 237 Ark. 500, 374 S.W.2d 465 (1964) (three young boys drowned in a former golf pond—recovery denied); Hankins v. Southern Foundation Corp., 216 F. Supp. 554 (D.D.C. 1963) (eleven-year-old fell through ice over ditch, located in an area where children habitually congregated, and drowned); Ansin v. Thurston, 98 So. 2d 87 (Fla. App. 1957) (nine-year-old drowned in excavation containing floating dock and raft), *but see* Adler v. Copeland, 105 So. 2d 594 (Fla. App. 1958) (court denied recovery where five-year-old drowned in swimming pool saying that swimming pools are common in South Florida); Gustafon v. Consumer Sales Agency, Inc., 414 Ill. 235, 110 N.E.2d 865 (1953) (seven-year-old fell through ice on pond in close proximity to thickly populated district and drowned); City of Pepkin v. McMahon, 154 Ill. 141, 39 N.E. 484 (1895) (water contained floating log); Bartlett v. Heersche, 204 Kan. 392, 462 P.2d 763 (1969) (two young boys drowned in sand pit located in residential area), *but see* McCormick v. Williams, 194 Kan. 81, 397 P.2d 392 (1964) (for proposition that Kansas does not recognize attractive nuisance doctrine for drownings occurring in modern swimming pools); Curry v. Fruin-Colnon Contracting Co., 202 So. 2d 345 (La. 1967) (eight-year-old drowned in pit located in thickly settled community), Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So. 2d 791 (1949) (four-year-old drowned in unfenced excavation located in populous area); Davoren v. Kansas City, 308 Mo. 513, 273 S.W. 401 (1901) (two six-year-olds fell through ice over pond while skating), *see* Van Alst v. Kansas City, 239 Mo. App. 346, 186 S.W.2d 762 (1945) (court indicated that although Davoren, *supra*, was decided on the nuisance theory, it is the same as the attractive nuisance doctrine); Barlow v. Gurney, 224 N.C. 223, 29 S.E.2d 681 (1944) (four-year-old fell into pond trying to catch tadpoles), *but see* Bell v. Page, 2 N.C. App. 132, 162 S.E.2d 693 (1968) (denied recovery where nine-year-old drowned in an unfenced swimming area maintained in violation of city ordinance); Lynch v. Motel Enterprises, 248 S.C. 490, 151 S.E.2d 435 (1966) (retarded seven-year-old drowned in unfenced pool located near a school); Williams v. Town of Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (1949) (water in reservoir deceptive as to depth and dangerous due to sloping floors and walls covered with slick moss), *see* Purdue v. City of Sweetwater, 54 Tenn. App. 286, 390 S.W.2d 683 (1965) (court said that combination of attracive nuisance doctrine and playground theory are equivalent to the interpretation of RESTATEMENT § 339); Brown v. Salt Lake City, 33 Utah 222, 93 P. 570 (1908) (eight-year-old fell through unguarded conduit), *but see* Brinkerhoff v. Salt Lake City, 13 Utah 2d 214, 371 P.2d 211 (1962) (denying recovery for the drowning of a two-year-old in an ancient canal); Bjork v. City of Tacoma, 76 Wash. 225, 135 P. 1005 (1913) (three-year-old sucked through opening in a flue which was near a playground); *but see* Meyer v. Gen. Elec. Co., 46 Wash. 2d 251, 280 P.2d 257 (1955) (denied recovery for the death of a two-year-old who fell into an unfenced

liable for trespassing children who have drowned on their premises.[78] There remain only eleven states that apparently follow Mississippi in denying application of the doctrine to all cases involving water hazards.[79] In six jurisdictions no differentiation is made between child and adult trespassers and the traditional duty to refrain from willful and wanton conduct remains intact.[80]

V. A Need for Change

A. *Number of Drownings*

Dean Prosser questions the "soundness of such arbitrary rules as to what children may always be expected to comprehend."[81] He points out that the validity of the assumption is jeopardized when compared to the number of children who have lost their lives by virtue of these dangerous conditions.[82]

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ditch); Hatten v. Mason Realty Co., 148 W. Va. 380, 135 S.E.2d 236 (1964) (question of fact presented as to the defendant's liability where an eight-year-old drowned in a pool of water located in a residentially developed area).

[78] *Id.*

[79] Alabama Great S. R.R. v. Green, 276 Ala. 120, 159 So. 2d 823 (1964) (abandoned pond located in residential area where children were known to frequently attend); Staley v. Security Athletic Ass'n., 152 Col. 19, 380 P.2d 53 (1963) (fenced swimming pool); Fickling v. City Council of Augusta, 110 Ga. App. 330, 138 S.E.2d 437 (1964) (pool situated in thickly settled area); Bass v. Quinn-Robins Co., 70 Idaho 308, 216 P.2d 944 (1950) (lake located in residential area serving no useful purpose); Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953) (pond containing raft which was visible from nearby streets); Hecht v. Des Moines Playground & Recreation Ass'n., 227 Iowa 81, 287 N.W. 259 (1939) (swimming pool not an attractive nuisance), *but see* Appling v. Stuck, 164 N.W.2d 810 (Iowa 1969) (court said each case turns on its own peculiar facts and not according to any rigid classification); Anderson v. Valley Feed Yards, 175 Neb. 719, 123 N.W.2d 839 (1963) (water is not itself an attractive nuisance); McCullough v. Tilden, 44 Misc. 2d 256, 253 N.Y.S.2d 422 (Sup. Ct. 1964), *aff'd* 25 App. Div. 2d 496, 267 N.Y.S.2d 483 (1966) (residential backyard swimming pool); Atchison, T. & S.F. Ry. v. Powers, 206 Okl. 322, 243 P.2d 688 (1952) (unfenced pond); Masher v. City of Casper, 67 Wyo. 268, 219 P.2d 125 (1950) (excavation located on a playground); Washabaugh v. Northern Virginia Constr. Co., 187 Va. 767, 48 S.E.2d 276 (1948) (raft in pond).

[80] Lewis v. Mains, 150 Me. 75, 104 A.2d 432 (1954); Hicks v. Hitaffer, 256 Md. 659, 261 A.2d 769 (1970); Prudhomme v. Calvine Mills, Inc., 352 Mass. 767, 225 N.E.2d 592 (1967); Labore v. Davidson Constr. Co., 101 N.H. 123, 135 A.2d 591 (1957) (court intimated that if the landowner was liable it would be under the provisions of Restatement § 339) (it is questionable whether New Hampshire will continue to refute the special rule relating to trespassing children); Brown v. Rechel, 108 Ohio App. 347, 161 N.E.2d 638 (1959); Bottom's Adm'r v. Hawks, 84 Vt. 370, 79 A. 858 (1911).

[81] Prosser, *Trespassing Children, supra* note 5, at 458.

[82] *Id.* The judicial process of creating arbitrary categories of dangers to which all children are held, as a matter of law, to appreciate and understand has broken down

Information concerning the number of drownings, circumstances surrounding these fatalities, and the nature of the victims has been plagued with an insufficiency of recent data. A novel study was conducted in 1965 in order to determine the need for protective measures to eliminate the number of deaths attributable to swimming pools.[83] A total of 484 pool fatalities were reported to have occurred. This number was obtained from the drownings listed in local newspapers. The residential swimming pool was the site of 230 or 47% of these drownings. Furthermore, 155 or 67.4% of these victims were children in the age group of four and under.[84] Forty-one of the victims were trespassers.[85] Mississippi is designated as having only two pool fatalities by this report.[86]

The Mississippi State Board of Health reported 122 drownings in the year 1965.[87] In 1969, 143 drownings were recorded. Forty-four of the drownings occurring in 1969 were attributable to those of fifteen years

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in two types of cases. The first is where the landowner knows or has reason to know that children who are too young to perceive the danger are likely to trespass on the premises. The second situation is where there is an enhanced risk, greater than the ordinary one normally attending such condition. PROSSER § 59, at 380-81.

[83] Webster, *Pool Drownings and Their Prevention*, 82 PUB. HEALTH REP. 588 (1967).

[84] *Id.* at 590. The following locations were the site of the remaining swimming pool fatalities: motel and hotel—10.9%; apartments—10.7%; public—17.8%; group private—2.9%; organization—2.7%; school—1.7%; fish or decorative pool—3.5%; and not specified—2.3%. *Id.* at 591.

The other age groups designated in the study and the number of resulting drownings were:

AGE GROUP	NUMBER OF DROWNINGS
5 to 9	22
10 to 14	8
15 to 19	9
20 to 24	5
25 to 39	6
40 to 64	18
65 and older	6

Id. at 590.

See also Press, Walker, and Crawford, *An Interstate Drowning Study*, 58 AM. J. PUB. HEALTH 2275 (1968). A tabulation of drownings occurring in five states indicated that twenty-one of the forty-one drownings occurring in private swimming pools were attributable to children in the age group of four and under.

[85] Webster, *Pool Drownings and Their Prevention*, 82 PUB. HEALTH REP. 592 (1967).

[86] *Id.* at 588.

[87] Letter from Mississippi State Board of Health to Gerald Burnett, February 3, 1971.

of age and below.[88] No statistics are available for drownings in Mississippi which occurred in swimming pools, nor is any differentiation made between trespassers and non-trespassers. Although Mississippi has not been plagued with drownings arising from the backyard swimming pool, this could easily become a serious problem. Not even one death is justified. With decreasing hours in the work week and higher incomes among all our inhabitants, it may not be long before the neighborhoods are infested with swimming pools.

B. *The Residential Pool*

Despite justifications for the Mississippi rule, there is one situation in which liability should be imposed. This is the case of a private swimming pool located in a residential neighborhood inhabited by children of tender years. When the homeowner knows that these children are likely to trespass or has actual knowledge of their invasions, he should be duty bound to take some precautions. Perhaps the best safeguard is a fence surrounding the pool. If one is financially able to enjoy the luxuries of a pool, he should be able to afford an adequate fence. Maybe in such a case the supreme court would find the attendant circumstances present to include a swimming pool within the attractive nuisance doctrine. However, this proposition does not seem likely in light of past decisions.

A fence is not an unreasonable burden to impose upon one who purchases a swimming pool. Fences that will not distract from the aesthetic value of the property can be procured. Certainly the use of the property will not be impaired. In fact, the utility argument advanced by the Mississippi Supreme Court seems to lose its pertinence in

[88] *Id.* The following statistics of the Mississippi State Board of Health provide the age of victims and number of drownings which have occurred in Mississippi for the past ten years:

	In Water Transport		Not in Water Transport	
Year	All Ages	Under Age 15	All Ages	Under Age 15
1960	34	4	113	42
1961	23	10	99	42
1962	36	6	84	30
1963	30	4	95	41
1964	32	4	110	53
1965	21	4	101	42
1966	48	8	99	45
1967	33	3	96	45
1968	32	3	115	44
1969	24	0	119	44

this situation. The enjoyment and social status accompanying such pleasures are not entitled to protection above the life of a two- or three-year-old child.[89]

Arizona has recently recognized the fallacy of the utility argument in this case.[90] In earlier decisions the Arizona Court consistently held that water hazards were excepted from the doctrine. When confronted with the backyard swimming pool the posture reversed. An adequate fence would impose only a nominal burden upon the possessor. In cases involving business and industry the court stated that it did not want to impair industry and development by burdening them with prohibitive costs. The emphasis which has been placed on the immunities of the landowner should lose its priority. Swimming pools do present dangers which may not be perceived by the immature child. The danger can be eliminated without unreasonable precautionary measures.

VI. Conclusion

This writer is of the opinion that the anacronistic attitude of the Mississippi Supreme Court in excluding water hazards from the attractive nuisance doctrine should be abrogated in cases involving the private residential swimming pool. The reasoning underlying the traditional basis for the exclusion is a product of a bygone era. A landowner is in the best position to protect young trespassing children from the dangers which he has placed before them.[91] An effective barricade surrounding the pool is not an unreasonable requirement.

The *Restatement (Second) of Torts* § 339 seems to provide the best alternative in the child trespass area. A more equitable result evolves if the ultimate decision hinges on the variety of factors presented by each case. The fact still remains that the attractive nuisance doctrine in Mississippi does not now encompass water hazards. Drownings continue to rank fourth in accidental death tolls.[92] A policy oriented toward pool safety would aid in an effort to prevent unwarranted deaths. Perhaps reform can be obtained from legislation;[93] it is obvious that we can no longer neglect our obligations.

F. Gerald Burnett

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[89] *See* Gorfinkel, *Residential Swimming Pools and "Attractive Nuisance" in California*, 13 Hastings L. Rev. 64-65 (1961).

[90] Giacona v. Tapley, 5 Ariz. App. 494, 428 P.2d 439 (1967).

[91] Prosser, *Trespassing Children*, *supra* note 5, at 429.

[92] Committee on Accident Prevention, American Academy of Pediatrics, *Perils Of The Water: The Problem Of Drowning And The Child*, 44 Pediatrics 886 (1969).

[93] Two states have considered the dangers attributable to swimming pools to be

so great as to justify legislation regarding fencing. FLA. STAT. ANN. § 125.01 (Supp. 1971), § 167.101 (1966); VA. CODE ANN. § 15.1-29 (1964).

Some municipalities have passed ordinances to require fencing of swimming pools in thickly settled communities. Violation of these ordinances have led to liability on the part of the landowner. Kasunich v. Kraft, 201 Cal. App. 2d 177, 19 Cal. Rptr. 872 (1962) (gate to swimming pools remained open for one hour while pool was not in use thereby violating local ordinance); Mitchell v. Akers, 401 S.W.2d 907 (Tex. Civ. App. 1966) (ordinance requiring both a self-locking and self-closing gate was violated by failing to have the self-closing device); Healy v. City of New Rochelle, 25 App. Div. 2d 446, 266 N.Y.S.2d 861 (1966) (failure to erect a fence in violation of a building permit held to be the equivalent to the intentional infliction of willful and wanton injury). *See generally* Annot., 20 A.L.R.3d 1395 (1968); Annot., 92 A.L.R.2d 1276 (1963).

A PROPER BASIS FOR AMENABILITY TO PROCESS IN FEDERAL DIVERSITY CASES

Introduction

In any action brought in a federal court in which the object is to recover a personal money judgment against the defendant, there are three requirements which must be satisfied. The plaintiff must select a court which (1) has jurisdiction of the subject matter of the suit, (2) may assert jurisdiction over the person of the defendant and (3) is located in a district where venue is proper. The concepts of in personam jurisdiction over the person of the defendant (3) is located in a district where venue is proper. The concepts of in personam jurisdiction and venue sometimes work at cross purposes with each other and bar wronged persons from judicial relief. To eliminate this potential conflict the proposal suggested in this paper would remove the territorial restrictions on service of federal process, and focus attention instead on the problem of selecting a proper venue.

The most difficult problem in accomplishing such a proposal is overcoming the traditional concept that in personam jurisdiction must be restrictive. In assuming jurisdiction over defendants, the courts have been guided by such vague terms as "traditional notions," "fair play," and "substantial justice." All of these phrases contain strong emotional pleas which have precluded, for the most part, an objective consideration of a proper basis for in personam jurisdiction in the federal courts.

The principle of containment within state lines of the jurisdiction of inferior federal courts has had a long history of permanency. From the adoption of the Judiciary Act of 1789 to the present, the federal courts have by and large been restricted to serving their process only where the state courts may do so. Until very recently this system has been accepted almost without question.

In this paper, both the historical basis and the present standards for jurisdiction in the federal courts are examined to demonstrate that its illogical underpinnings should be discarded in favor of a more realistic foundation. The solution proposed may not be the final answer; but if the reader can be convinced that the constitutional restrictions placed on the reach of state process by the fourteenth amendment due process clause have no application to the federal courts, at least a basis for reform has been laid.

Early History

In establishing the territorial jurisdiction of the federal courts, Congress had several constitutionally valid alternatives. First, it could

have treated the entire United States as a single jurisdiction. Had this been done, service of process would have been permitted throughout the United States. Second, Congress could have established individual federal districts as separate territorial entities for jurisdictional purposes. Lastly, a compromise position could have been taken combining any number of the federal districts to establish the territorial boundary of process for the federal courts.[1]

By the adoption of the Judiciary Act of 1789,[2] Congress selected the second alternative. The United States was divided into judicial districts whose territorial limits were coextensive with the territorial limits of the state in which they were located. Two courts were allotted to each district, a circuit court and a district court. The in personam jurisdiction of these courts was regulated by clause II of the Judiciary Act which provided:

> No person shall be arrested in one district, for trial in another, in any civil action, before a circuit or district court; nor can a civil suit be brought before either of those courts, against an inhabitant of the United States, by any original process, in any other district, than that whereof he is an inhabitant; or in which he shall be found, at the time of serving the writ.[3]

In the early case of *Ex parte Graham*,[4] that clause was interpreted to mean that the circuit and district courts of the United States could not, either in suits at common law or equity, send their process into another district unless specifically authorized to do so by Congress. It was thought that the appointment of courts for each district necessarily restricted the jurisdiction of the court to the bounds of the district in which it sat.[5] A rule allowing the court of one district to send its process into another district, according to Justice Washington:

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[1] *See* Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Manderino, *Erie v. Tompkins: A Geography Lesson*, 5 DUQUESNE UNIVERSITY L. REV. 465 (1967).

[2] Judiciary Act of 1789, 1 Stat. 731.

[3] In defense of such a position it should be remembered that the theory of the Judiciary Act of 1789 was in line with all of the steps taken to form the Federal Judiciary—to prevent as far as possible jealousy between the state and federal government, and to relieve fears of encroachment by the federal government upon the powers reserved to the states. Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 427 (1930).

[4] 10 F. Cas. 911 (No. 5657) (C.C.E.D. Pa. 1818).

[5] Another factor which contributed to the establishment of geographically limited federal courts was the idea at common law that personal actions often were based on the trespass form of action. Thus "a judgment often was regarded as no more than a basis for immediate levy of execution against defendant's person or his land . . . and . . . [s]ince a court could not enforce a judgment by execution without physical power over the defendant or his property, it is not surprising that common law judges and legal writers regarded a court's actual physical power over defendant

> [W]ould result in a clashing of jurisdiction between those courts, which could not easily be adjusted; and impression upon suitors, too intolerable to be endured.[6]

Ten years later, in *Picquet v. Swan*,[7] Judge Joseph Story expressed his views upon in personam jurisdiction of the federal courts:

> Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. . . . This results from the general principle, that a court created within and for a particular territory, is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a country, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority. *It was doubtless competent for congress to have authorized original as well as final process, to have issued from the circuit courts and run into every state in the Union. But it has conferred no such general authority.*[8] (emphasis added.)

Thus Justice Story recognized that there was no constitutional limitation on the reach of federal process, but he insisted that the entire structure of the Judiciary Act proceeded upon the theory that without positive legislation to the contrary, no judgment could be rendered against any person unless he was personally served with process within the borders of the district where the court sat.[9]

The rule prohibiting the service of federal process beyond the borders of the district where the court presided continued unchanged for almost 150 years after the passage of the First Judiciary Act.[10] As late as 1925, the United States Supreme Court[11] cited *Ex parte Graham*[12]

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as a necessary prerequisite to the validity of a judgment." 4 C. A. WRIGHT & A. R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1064, at 206 (1969). [Hereinafter cited as WRIGHT & MILLER]; *See also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conventions*, 65 YALE L. J. 289 (1956).

[6] *Ex parte* Graham, 10 F. Cas. 911, 912 (No. 5657) (C.C.E.D. Pa. 1818).

[7] 19 F. Cas. 609 (No. 11,134) (C.C.D. Mass. 1828).

[8] *Id.* at 611.

[9] *Id.* at 613.

[10] It was held that even though the Process Acts of 1789 and those of later years adopted the forms of writs and modes of process of the states, they had no effect if they contravened the legislation of Congress. Toland v. Sprague, 37 U.S. (12 Pet.) 300 (1838).

[11] *See* Robertson v. Railroad Labor Board, 268 U.S. 619 (1925).

[12] 10 F. Cas. 911 (No. 5657) (C.C.E.D. Pa. 1818).

as authority for the proposition that a federal district court cannot issue process beyond the limits of its district. Justice Brandeis spoke for the court:

> Such was the general rule established by the Judiciary Act of September 24, 1789, . . . in accordance with the practice at the common law. . . . And such has been the general rule ever since.[13]

Jurisdictional Developments in the State Courts

The development of jurisdictional principles ignored any consideration of flexibility. In 1877, the United States Supreme Court firmly aligned itself with the restrictive territorial principle of in personam jurisdiction by its decision in *Pennoyer v. Neff*.[14] The Court held that a state court could not render a money judgment against a nonresident who had been served only by publication of summons. The Court was of the opinion that to allow process from the courts of one state to reach into another state to summon a party there domiciled would violate due process.[15]

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[13] 268 U.S. at 622; *See also* Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937).

[14] 95 U.S. 714 (1878). Although Pennoyer was based on what is now called the "power myth," meaning that the physical presence of the defendant within the state is a necessary prerequisite to a court's assertion of in personam jurisdiction over him, there is an important dictum in the case which often has been overlooked:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service or process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. (*Id.* at 735.)

See also Foster, *Judicial Economy: Fairness and Convenience of Place of Trial*, 47 F.R.D. 73, 82 (1969).

[15] Although the result reached in this case was correct, the reasoning behind the decision is questionable. In commenting upon Pennoyer, Professor Abraham has observed that:

> With the adoption of the Fourteenth Amendment, the courts read the territorial sovereignty concept into the due process clause. The limitations on state process were thus given a constitutional foundation. But the reliance on the Fourteenth Amendment was at first somewhat misleading, for the courts continued to place the emphasis on state's rights rather than on individual liberty. That is, they were more concerned with the encroachment upon a sister state's sovereignty which resulted from extraterritorial service, than they were with the rights of the defendant. As the limitations were then interpreted, a more appropriate source would have been the Full Faith and Credit clause.

Abraham, *Constitution Limitations upon the Territorial Reach of Federal Process*, 8 Vill. L. Rev. 520, 532 (1963).

As the United States became a mobile and industrialized society, the *Pennoyer* doctrine became increasingly inadequate. The doctrine of service within the state began to give way to more liberal theories. The doctrine of "consent" was devised as a substitute for service within the state,[16] thus beginning the gradual emergence of state "long-arm" jurisdiction. In addition to consent, the concepts of "presence"[17] and "doing business,"[18] were developed by the state courts in the ensuing years to require absentee defendants and nonresidents of the state to respond to litigation initiated there.

The Adoption of the Federal Rules of Civil Procedure in 1938

During the period in which the states were expanding the scope of permissible service to include defendants who were not present within the state, the Federal Rules of Civil Procedure were adopted. Rule 4 of the new federal rules governed service of process in the federal system, and subdivision (f) of Rule 4 implemented a sweeping change in the in personam jurisdictional power of the federal courts. It provided that:

> [A]ll process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when a statute of the United States so provides, beyond the territorial limits of that state.[19]

This expansion of the territorial reach of federal process was adopted because the practice of limiting the jurisdiction of the federal district courts to the district where the court was located led to anomalous results in states which had more than one federal district, and it proved to be increasingly unrealistic with the passage of time.[20]

It would seem that the obvious purpose of including a provision in Rule 4 to allow federal process to be served anywhere within the state in which it sat was to place the federal courts on an equal plane with the state courts regarding service of process. However, what actually happened was far different. In effect, the state territorial restrictions of the *Pennoyer* doctrine became the federal standard. Thus, the federal courts were placed in the same position the state courts

[16] *See* Hess v. Pawloski, 274 U.S. 352 (1927). Due process requires, however, that the statute must contain a provision making it reasonably probable that notice of service on the state official would be communicated to the non-resident defendant. Wuchter v. Pizzuti, 276 U.S. 13 (1938).

[17] *See* Milliken v. Meyer, 311 U.S. 457 (1940).

[18] *See* Doherty v. Goodman, 294 U.S. 623 (1935).

[19] Fed. R. Civ. P. 4(f).

[20] Wright & Miller § 1124, at 518.

occupied in 1877. This meant that the federal courts were to play a catch-up game with the state courts in process matters for some time to come. In 1938 the states were no longer restricted to serving process within their borders. They had effectively used the concepts of "consent," "presence," and "doing business" to extend the reach of their process, while the federal courts had sat idly by and done nothing. By 1945 a state court could assert jurisdiction over any nonresident defendant who had sufficient "minimum contacts" with the state no matter where he resided,[21] while the federal courts could only serve process on a person who resided anywhere in the state in which the court sat. At the very least, Rule 4(f) should have provided that service of process by a Federal District Court on a person outside the state would be permissible when authorized by state law as well as federal law. Since this was not done, prior to the 1963 amendment to Rule 4(f), which expressly permitted service outside the state when authorized "by these rules," some federal courts viewed Rule 4(f) as a bar to extraterritorial service under state statutes.[22]

Rule 4 (d) and Amenability to Process

The territorial reach of process is inextricably tied with the concept of amenability to process. Clearly Rule 4(f) deals with the question of the reach of federal process, but it has also been suggested that although Rule 4(d) governs the manner in which process is to be served, it also contains guidelines for determining whether a defendant is amenable to process. The lack of clarity of expression in Rule 4(d) is, no doubt, the basis for this assumption. From its inception, Rule 4(d) has been difficult to apply. For example, subsection (d)(7) of Rule 4, as it was first promulgated, permitted an alternate method of personal service on the defendants described in subsection (1) or (3) of the rule; providing that service upon those defendants would be "sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made." This led to the obvious incongruity of looking to the law of the state of service, rather than to the law of the forum, for authority to employ such service.[23] If a federal court in state A wished to serve a defendant in state B, in the absence of federal statutory authority, it could only serve that defendant in state B, if state B itself could constitutionally assert jurisdiction over that defendant and had chosen to do so. The contacts which the defendant had with state A were of no consequence. The amendment

[21] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[22] Wright & Miller § 1126, at 529.

[23] *Id.* § 1112, at 461.

of subsection (d)(7) of Rule 4 in 1963 provided a partial remedy. The amended version provides that service will be sufficient if it is served "in the manner prescribed by the law of the state in which *the district court is held.*" The federal courts may now take advantage of state long-arm statutes, which commonly permit personal service outside the forum state in those situations in which the defendant has had some contact with the state.[24]

The 1963 amendment to Rule 4(d)(7) resolved one aspect of the amenability question under Rule 4, but another one still remained under subsection (d)(3) of Rule 4.[25] In 1952, the supreme court, in *Perkins v. Benguet Consolidated Mining Co.*,[26] held that a state is not required to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause of the fourteenth amendment if it voluntarily chooses not to do so. This meant that two different standards of amenability could exist in a state because the federal standard is as broad as due process allows; it is not limited by state statutory requirements. The question which the federal court must decide in those states which have adopted restrictive standards of amenability to process is whether the broad federal standard will govern or the narrower state standard will control in suits initiated in federal court.

Jaftex v. Randolph Mills, Inc.[27] squarely presented the issue to the Second Circuit Court of Appeals. In an opinion written by Judge Clark, the court held that the amenability of a foreign corporation to service of process is not a question of substantive law under the *Erie* Rule,[28] and that the question of whether a corporation has been doing sufficient business to be subject to jurisdiction has always been treated as a federal matter in the federal courts.

The second circuit expressly overruled *Jaftex* in *Arrowsmith v. United Press International.*[29] Judge Friendly, in his majority opinion, stated that while Rule 4(d)(7) authorizes service prescribed by state law,

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[24] *Id.*

[25] Rule 4(d)(3) provides that service shall be made "upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

[26] 342 U.S. 437 (1952), *rehearing denied*, 343 U.S. 917 (1952).

[27] 282 F.2d 508 (2d Cir. 1963).

[28] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[29] 320 F.2d 219 (2d Cir. 1963).

this does not indicate that Rule 4(d)(3) authorizes a federal standard to be applied in determining jurisdiction. Both 4(d)(7) and 4(d)(3) relate only to the manner of service; the question whether the foreign corporation is subject to service in any manner is left unanswered. Presently there is a consensus among courts of appeal from nearly all the circuits that in diversity actions the amenability of a foreign corporation to suit is determined according to state law.[30] This rule is applied regardless of whether service is made under 4(d)(7) or 4(d)(3).[31]

Since the manifest trend among the states is to extend jurisdiction to the constitutionally permissible limits, the *Arrowsmith* rule will not be of much significance in many cases, although it may pose problems in multi-party litigation where one or more defendants are amenable to federal jurisdiction, but not state jurisdiction.[32]

The Territorial Limits of Process-Rule 4(f)[33]

Rule 4(f) provides that process "may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." In addition, a 1963 amendment to Rule 4(f) authorizes service beyond the state anywhere within 100 miles of the court in which the case is pending upon certain additional parties, impleaded parties and persons required to respond to an order of commitment for civil contempt.[34]

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[30] *See* Annot., 6 A.L.R. 3d 1103 (1966).

[31] *Id.*

[32] *See* WRIGHT & MILLER § 1075, at 311. The authors suggest that an exception should be made to the Arrowsmith rule to permit use of federal law based on a federal interest in encouraging the complete determination of all issues in one suit since the interstate character of these disputes seems particularly appropriate for resolution in the federal courts.

[33] There is no attempt to discuss extraterritorial service under subsection (e) of Rule 4. Like Rule 4(d)(7), Rule 4(e) permits extraterritorial service when authorized by state law, and thus has been interpreted to deal only with the manner of service rather than amenability to process. The precise relationship between Rule 4(e) and Rule 4(d)(7) has remained a mystery to most writers. It would be better to recognize frankly that there is considerable overlap between the two than to agonize over the problem of separating them in a mechanical fashion. WRIGHT & MILLER § 1061, at 199, 200.

Neither the Advisory Committee notes nor the body of the rule provides a clear distinction between the two. Since there is no apparent reason to prefer the use of one or the other rule in connection with extraterritorial service pursuant to state law, it should make no difference whether the plaintiff uses Rule 4(d)(7) rather than Rule (e) or vice versa, so long as state practice is properly followed. WRIGHT & MILLER § 1114, at 469.

[34] *See* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 HARV. L. REV. 601 (1964).

The "100-mile bulge" amendment is the first time, in the absence of statute, that the federal rules have permitted service of federal process beyond the reach of the forum state's process.[35] The 1963 amendment recognized the increasing incidence of multi-party litigation in the federal courts and the need to compromise territorial boundaries to facilitate the handling of these cases.[36]

Although nearly all the legal writers who have commented on the 100-mile bulge amendment categorically assert that there is no doubt as to its constitutionality,[37] it has received a mixed reception. In *Karlsen v. Hanff*,[38] it was held that Rule 4 deals only with the different aspects of service and does not affect amenability to suit. "To hold otherwise," said the court, "would fly in the face of the Supreme Court's decision in *Hanson v. Denckla*, . . . which requires certain minimal contacts with the forum in order to subject a defendant to in personam jurisdiction."[39] However, in *Sevits v. McKiernan-Terry Corp.*,[40] the court held that service of a third party complaint effected in another state pursuant to the 100-mile provision of Federal Rule 4(f) was not unconstitutional in diversity cases. To that court, any constitutional objections to the rule were foreclosed by decisions upholding nationwide service in interpleader actions which are also based on diversity. If state law were deemed controlling in these circumstances, the liberalizing purpose of the 100-mile provision would be subverted. The court was satisfied that the rule expresses a federal policy in favor of efficiency of federal court litigation that is sufficient to override state law.

Certainly it would be desirable for the federal test to always govern

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[35] *See* Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

[36] WRIGHT & MILLER § 1127, at 532. The greatest benefit derived from the 100-mile provision has been its employment to grant relief in multi-party actions in metropolitan areas. However, it will have absolutely no effect in Alaska or Hawaii and only limited effect in many of our inter-mountain and southwestern states. *Id.* at 535.

[37] The main case in support of this position is Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945), wherein the Supreme Court, in dictum, said, "Congress could provide for service of process anywhere in the United States . . . ." *Id.* at 442. However, not all of the commentators support this view. *See* Abraham, *Constitutional Limitations Upon The Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963). One of the bases for constitutional doubt on this question comes from the dissenting opinion of Mr. Justice Black in National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). He took the position that if state courts are unable under the Pennoyer Doctrine to acquire in personam jurisdiction over one outside state boundaries, a federal district court presiding over a diversity case is likewise without power.

[38] 278 F. Supp. 864 (S.D.N.Y. 1967).

[39] *Id.* at 865.

[40] 270 F. Supp. 887 (S.D.N.Y. 1967).

questions of amenability when service is made under the 100-mile provision, but the limited case law to date is not conclusive, and there is authority to the effect that Rule 4(f) does not deal with amenability.[41] If state law is to govern, then the question arises as to whether the defendant's amenability should be tested by the forum state's law or by the law of the state of service.[42] The only case to date which directly confronts this problem appears to be *Coleman v. American Export Isbrandtsen Lines, Inc.*[43] Coleman, a longshoreman, brought an action in the Southern District of New York to recover for injuries sustained aboard the S. S. Exchequer, a vessel owned and operated by American Export Isbrandtsen. American Export filed a third party complaint against Atlantic and Gulf Stevedores claiming that any liability to Coleman was due to the negligence of Atlantic and Gulf Stevedores in having failed to properly secure a hatch when the Exchequer was in Philadelphia, Pennsylvania, before sailing to Hoboken, New Jersey. Atlantic and Gulf was a Pennsylvania corporation having its principal office in Philadelphia, but assertedly doing no business in New York. Summons was served on Atlantic and Gulf in its Philadelphia office pursuant to the 100-mile provision of Rule 4(f). Atlantic and Gulf moved to dismiss the third party complaint for lack of jurisdiction, using the argument which was successful in the *Karlsen* case, *supra*, that the 100-mile provision of Rule 4(f) simply allowed service outside the state where the court is sitting with respect to persons already subject to the jurisdiction of that state.

The district court granted the motion to dismiss, but the Second Circuit Court of Appeals reversed. However, the court expressed its decision in somewhat unusual terms:

> To be sure, process can be validly served in another state within the "bulge" created by Rule 4(f) only on persons over whom that state has jurisdiction and, very likely, only on persons within that class over whom it has chosen to exercise it[44] . . . . [A]lthough Rule 4 fixes the manner and scope of service, it does not say when the person served is subject to the jurisdiction of the court that served him. Similarly, although Rule 4(f) provides for out-of-state service on certain defendants, such service will not be valid unless they have enough contacts with the state of service to be subject to suit there.[45]

The court took the position that the state where the defendant is served must be able to assert jurisdiction over him, therefore, adopting

[41] WRIGHT & MILLER § 1127, at 533.

[42] *Id.* at 535.

[43] 405 F.2d 250 (2d Cir. 1968).

[44] *Id.* at 252.

[45] *Id.* at 253.

the second alternative suggested above. Professors Wright and Miller commented on this problem:

> The holding in *Arrowsmith* and cases of like tenor seem to require the application of forum law. But the amenability rules of the forum presumably will not extend to the "bulge"; if they did, service would be possible under Rule 4(d)(7) or Rule 4(e), which would make service under the 100-mile provision unnecessary. But service under the law of the state of service also seems illogical.[46]

Clearly, the only plausible solution to this dilemma is to adopt a federal standard for service of process.

Analysis of Present Amenability Standards

The reliance placed on state rules and modes of service by the federal courts has caused a number of problems. For example, under the *Arrowsmith* rule, it is not always clear what the state standards of amenability are. The federal court must always try to predict how the state courts would rule in a similar situation. Difficulty is encountered if the state amenability standards are still in the developmental stage, or if the question is a close one over which competent jurists could honestly differ. One of the main arguments advanced in support of *Arrowsmith* has been that state law should not be extended beyond the borders of the state by a federal court when the state has voluntarily chosen not to do so by restricting the scope of its process. However, it should be obvious that nothing in *Arrowsmith* actually prevents this, since the federal court may have to guess how the state court would rule when it determines the amenability to process of a particular defendant.[47]

Assuming the federal court determines that the state court would assert jurisdiction in a given case, it must then determine whether the state standards are offensive to due process. Thus, the federal court must test the state standard by the federal standard of due process which the federal court cannot utilize if the state statutory standard is more restrictive.

The problem would not, however, be satisfactorily resolved by returning to the *Jaftex* rule. Both *Jaftex* and *Arrowsmith* are tested constitutionally by the fourteenth amendment due process clause. The federal courts should be allowed to use their own standard of constitutionality—the due process clause of the fifth amendment. Under this test, the defendant is amenable to process if he is a citizen of the

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[46] Wright & Miller § 1127, at 535.

[47] *See* Casano v. WDSU TV, 313 F. Supp. 1130 (S.D. Miss. 1970).

United States. Therein lies his minimum contact with the federal sovereignty.

The federal courts face a similar dilemma in the interpretation of the 100-mile bulge provision in Federal Rule 4(f). If either the law of the forum state or the law of the state of service is looked to in order to fix amenability, the result will be illogical. It apparently did not occur to the Second Circuit Court of Appeals in *Coleman* that if the law of the state of service is deemed controlling, the court will be faced with the same problem that was encountered under Rule 4(d)(7) before it was amended to provide that the law of the forum state should control amenability. Yet if the law of the forum state is applied, the fourteenth amendment due process limitation requires sufficient minimum contacts by the defendant with the forum state in order to sustain jurisdiction. The court in *Coleman* is grasping for legal straws in holding that state boundaries still mean something when the federal court serves its process extraterritorially under the federal rules. This is curious indeed when one considers that the federal courts have not attempted to limit the scope of service by the federal courts when service is made pursuant to a federal statute (such as the interpleader statute) which authorizes nationwide service.[48] It is true that the 100-mile bulge provision of Rule 4(f) obviously does not provide for nationwide service of process, but equally true is the fact that under the bulge provision, the in personam jurisdiction of the court is extra-territorial. It is not limited by intervening state boundary lines. The discriminatory interpretation of the federal rules, when compared to a federal statute, would appear to be foreclosed by the Supreme Court's holding in the *Mississippi Publishing*[49] case.

[48] For example, *see* State Farm Fire and Cas. Co. v. Tashire, 386 U.S. 523 (1967) which involved litigation ensuing from an accident which occurred when a Greyhound bus proceeding northward on a road in Shasta County, California, collided with a southbound pickup truck. Two passengers in the bus were killed and thirty-three others were injured, along with the bus driver and the driver of the truck. Four of the injured passengers filed suit in California against Greyhound Lines, Inc., the bus driver, the truck driver, and the owner of the truck. All of the individual defendants were Oregon residents, and Greyhound Lines, Inc., was a California corporation. State Farm Fire and Casualty, an Illinois corporation, brought an action in the nature of interpleader in the United States District Court for the District of Oregon because it had an insurance policy covering the truck driver which would pay up to $20,000 per occurrence. State Farm paid the $20,000 into court and asked the court to require all claimants to establish their claims against the truck driver and State Farm in this single proceeding and in no other. The court granted this request and the United States Supreme Court affirmed. It is clear that no restrictions were placed on the territorial reach of process in this case. Otherwise, the great number of claimants to this fund could not have been validly served and forced to adjudicate their claims to the fund in the Oregon District Court.

[49] Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945).

The application of state amenability standards by the federal courts has also created problems in the area of venue. At present, venue is actually a third jurisdictional obstacle the plaintiff must overcome before he can maintain an action against the defendant. Even if the court has jurisdiction of the subject matter and personal jurisdiction over the defendant, it cannot act unless "venue jurisdiction" is proper. As long as the concepts of venue and in personam jurisdiction are kept separate they may work at cross purposes with each other in the federal courts. The federal corporate venue statute furnishes an excellent example of how this potential conflict between jurisdiction and venue might arise. It provides that:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business *or is doing business,* and such judicial district shall be regarded as the residence of such corporation for venue purposes. (emphasis added.) [50]

In *Rensing v. Turner Aviation Corporation,*[51] the court, in interpreting that statute, said:

> [S]ince the phrase 'doing business' is found in Title 28 U.S.C.A. § 1391(c) in regard to venue and also is used with regard to the basic jurisdiction of the Court over the person of a foreign corporation, the following problems are presented:
>
> 1) Should Federal or State law govern in the interpretation of the phrase 'doing business' as contained in the venue section, 1391 (c) of the United States Code;
>
> 2) Should Federal or State law be applied in deciding whether a corporation is 'doing business' within the judicial district of the court so that it is 'present' for jurisdictional purposes and thus amenable to service;
>
> 3) Should the same test for 'doing business' be applied in both instances.[52]

The court held that questions of venue are to be decided by federal law and questions of jurisdiction in diversity cases are to be decided by the law of the state wherein the particular district court is sitting. The decision is in accord with the general rule that venue is a procedural matter and in personam jurisdiction is a substantive matter. Verbal niceties aside, the effect of such a rule is to deny federal courts jurisdiction over corporate defendants in those states which apply a restrictive interpretation of "doing business" even though there may be no constitutional bar to the assumption of jurisdiction. The irony of the rule is that if the state refuses to assert jurisdiction, the matter

[50] 28 U.S.C.A. § 1391 (c) (1962).

[51] 166 F. Supp. 790 (E.D. Ill. 1958).

[52] *Id.* at 794.

is closed, and the federal courts sitting in that state must abide by that law. However, if the state does assert jurisdiction, the federal court must determine whether this assumption of jurisdiction transcends the outer bounds of due process which is itself the federal standard.

The American Law Institute Recommendations

The American Law Institute is presently conducting a study of the division of jurisdiction between state and federal courts which includes an analysis of in personam jurisdiction. The proposal which has been tentatively adopted by the ALI would allow federal process to be served wherever the authority of the United States may reach upon all parties "necessary for just adjudication" where state process would be insufficient to reach them.[53] In the words of the ALI "the criterion 'necessary for just adjudication' is intended to express that degree of urgency for the presence of scattered parties which goes beyond trial efficiency and economy, and involves further elements relating to the adequacy or fairness of a disposition made in the absence of particular parties."[54] Under this proposal if there are defendants necessary for a just adjudication who are beyond the reach of any one state, a federal forum is provided so long as there is some minimum diversity between adverse parties.[55] In cases where a judicial resolution of a controversy may inflict greater burdens than adjudication is worth, the ALI recommends that the district court exercise discretion in determining whether:

(1) to bring in the absent party from outside the state in which the district court is sitting;

(2) to allow the action to proceed without that party;

(3) to dismiss the entire action without prejudice if injustice cannot be otherwise avoided.[56]

The proposals submitted by the ALI are an improvement over pres-

[53] ALI Study of the Division of Jurisdiction between State and Federal Courts, (Proposed Final Draft No. 1 at 130). A proposal which would allow federal process to be served wherever the authority of the United States may lawfully reach on all named defendants if state process was inadequate to reach them was considered by the ALI but rejected as being too broad an expansion of federal jurisdiction. *Id.* at 127. It was feared that such a grant of jurisdictional power would greatly reduce the likelihood of further action by states to extend the reach of their own process. The proposal was also rejected on the ground that such a rule would put the power to create federal jurisdiction in the plaintiff's hands with the result that he could avoid local choice of law rules and policies. *Id.* at 128.

[54] *Id.* at 130.

[55] *Id.* at 131-32.

[56] *Id.* at 153-54.

ent procedure because they attempt to eliminate territorial restrictions on service of process when it is necessary to do so in the interests of justice. However, it is submitted that further improvements are possible. If the ALI proposals were adopted, the district judge would have to make three determinations in every case *before* allowing the plaintiff to bring the action:

(1) Are all the named defendants necessary parties?

(2) Is state process insufficient to reach any necessary party?

(3) Will a judicial resolution of the controversy inflict greater burdens than the adjudication is worth?

Giving proper consideration to these three preliminary issues may, in some instances, involve as much work for the trial judge as presiding over the actual litigation.

The major shortcomings of the ALI proposal are that the procedure is unnecessarily complicated and the results too unpredictable. There is no single uniform provision for the plaintiff to follow in his attempt to acquire jurisdiction over the defendant. Although the three criteria which must be satisfied appear to be based on objective standards, there is obviously a large amount of discretion the trial judge may exercise in reaching his decision.

PROPOSED SOLUTION

The confusion in the application of the various jurisdictional standards can be eliminated by adopting the following rule: In personam jurisdiction shall exist over a defendant where venue is proper as to that defendant.[57] The purpose of such a rule is twofold. First,

[57] The federal diversity venue provision [28 U.S.C. § 1391, (1962)] presently permits a plaintiff to bring suit in the district where (1) all the plaintiffs reside, (2) all the defendants reside or (3) the cause of action arose. Further revision appears to be necessary for two principal reasons. First, the restriction on federal service of process limits the effectiveness of the statute. Second, the intended interpretation of the phrase "in which the claim arose" is not clear. The removal of the territorial restrictions on service of federal process, as proposed in this paper, will eliminate the first objection. To remedy the second objection, the American Law Institute recommends that the phrase "where a substantial part of the events or omissions giving rise to the claim occurred" be substituted for the present "in which the claim arose." *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1314 (a)(1) (Tent. Draft No. 4, 1966). Under the ALI proposal there might be several districts in which substantial parts of the events or omissions giving rise to the claim occurred. This flexibility seems desirable.

The adoption of these recommendations should provide a workable basis for federal diversity litigation. Although these modifications would make diversity venue more plaintiff oriented than previously, a proper regard for the convenience of the

it eliminates territorial restrictions on service of process by the federal courts. Second, it removes the potential conflict of standards which presently exists between venue and in personam jurisdiction.

It is submitted that such a proposal can be effectuated if federal service is tested by the fifth amendment due process clause instead of the fourteenth amendment due process clause. Implicit in this change of standards is the assumption that the two due process clauses are capable of yielding different interpretations in a given fact situation. The statements from the reported cases on this question are conflicting. One court has said, "The guarantee of due process in the Fifth Amendment is not broader than the similar guarantee against state discrimination in the Fourteenth."[58] To another court "[d]ue process under the Fifth Amendment to the federal constitution, when applied by federal courts, serves as a basic protection of the citizen against unjust federal action and must be given even broader connotation than due process under the Fourteenth Amendment."[59] It is difficult to accurately assess what the courts really mean when they make such broad statements because the requirements of due process vary with the situation presented to the court. Probably the most widely accepted view is that " 'due process' means the same thing in both the Fifth and Fourteenth Amendments, but the former constitutes a restriction on the federal government only, while the limitation in the latter is on the states."[60] At first blush this would appear to mean that anything the fourteenth amendment would prohibit a state from doing, the fifth

defendant may be maintained through the use of the forum non conveniens motion authorized by 28 U.S.C. § 1404 (1962).

These brief comments are not an attempt to discuss all of the problems relating to federal diversity venue. For the reader who is interested in a more detailed commentary, the following articles are recommended: Note, *Federal Civil Procedure: Supreme Court Authorizes Transfer by a Court Lacking Personal Jurisdiction*, 1963 DUKE L.J. 168; Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82 (1968); Comment, *Federal Venue Amendment—Service of Process, Erie and Other Limitations*, 16 CATHOLIC U. L. REV. 297 (1967); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, (Tent. Draft No. 4, 1966); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954); Note, *Federal Courts—Change of Venue under Section 1404(a)—Consideration of Applicable Substantive Law "In the Interest of Justice,"* 25 LA. L. REV. 771 (1965); Note, *The Problem of Venue in Multiple District Litigation*, 41 NOTRE DAME LAW 507 (1966); Comment, *Federal Transfer: Problems of Multiple Litigation and the Inapplicability of Stare Decisis*, 34 J. AFR. L. 621 (1968), and Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965).

[58] *See* Rok v. Legg, 27 F. Supp. 243, 246 (S.D. Cal. 1939).

[59] United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957).

[60] *See* Bartlett Trust Co. v. Elliott, 30 F.2d 700 (E.D. Mo. 1929).

amendment would prohibit the federal government from doing. However, it is submitted that the true meaning is that within the *federal sovereignty*, the fifth amendment guarantees due process, and within the *state sovereignty*, the fourteenth amendment guarantees due process. This does not mean that due process within the federal sovereignty would be identical with due process administered by the state sovereignty. The 100-mile bulge amendment of Rule 4 (f) is a perfect illustration. Both the due process clause of the fifth amendment and the due process clause of the fourteenth amendment require "minimum contacts" by a defendant before he can be lawfully subject to an in personam judgment, but the fifth amendment due process test should involve the defendant's contacts with the *federal system* and the particular district court asserting personal jurisdiction over him; under the fourteenth amendment due process test, the focus is on the defendant's contacts with the particular *state* where the court asserting personal jurisdiction is sitting. In other words, the due process standards are the same, but when they are applied to two different sovereignties, the result may be that a federal court which happens to be sitting in a particular state may be able to assert personal jurisdiction over the defendant while the state courts of that same state would not be able to acquire jurisdiction over the defendant.

CONCLUSION

Congress has the power to extend the process of federal courts beyond its present limitations and consequently can delegate that power to the rule-making authority of the Supreme Court. So far neither Congress nor its rule-making delegate has deemed it advisable to enlarge the reach of federal process to its constitutionally permissible limits except in a few rare instances, but a reorganization of federal jurisdiction seems likely in the near future. First among the priorities in the restructuring of federal jurisdiction should be the removal of territorial restrictions upon the reach of federal process. The federal courts are a part of the national sovereignty which is independent of state sovereignty; therefore, federal process should in no way be restricted by state rules or by the boundaries of a state.

The key point, which must be accepted if meaningful reform is to take place, is that once federal process crosses state lines, amenability as a restrictive device has no meaning in the constitutional sense. Where service rests upon federal standards of amenability, i. e., the fifth amendment, the federal constitutional limitations upon the assumption of jurisdiction by the state courts are irrelevant. The due process test of the fifth amendment "would appear to involve the defendant's con-

tacts with the federal system and the particular District Court rather than his contacts with the state where the District Court sat."[61] Once the fifth amendment is adopted as the standard by which amenability to federal process is to be judged, it is clear that process may be served anywhere within the United States because no matter in which state the defendant is served, he will still have sufficient contacts with the federal sovereignty so that the maintenance of the suit there will not offend our "traditional notions of fair play and substantial justice." Just as a state may serve any person found anywhere within its borders, so a federal court can serve any person found within the limits of its sovereignty, which includes the entire United States. The fourteenth amendment test as applied to the states would no longer be applicable to federal service, with the result that the ambiguous "minimum contacts" and "fair play" tests, which only have meaning in the context of a case by case inquiry, would be discarded. At last there would be a definite federal standard which could be applied in every case.

The proposal to substitute venue for the in personam jurisdiction requirement is somewhat novel, yet it appears to be eminently practical. If federal district judges properly apply the doctrine of forum non conveniens, there is every reason to believe that the adoption of this proposal will work. Certainly it seems to be superior to the American Law Institute's proposals.

Richard L. Forman

[61] Foster, *Judicial Economy: Fairness and Convenience of Place of Trial*, 47 F.R.D. 73, n.97 (1969).

CONSTITUTIONAL ALTERNATIVES TO MISSISSIPPI'S FINANCIAL-RESPONSIBILITY LAWS

The twentieth century has witnessed an ever-increasing number of automobiles on the nation's highways and the expenditure of vast sums of money to construct new roads, streets, thoroughfares and highways to control a burgeoning traffic flow. As the number of automobiles on the highways increased, so, too, did the number of traffic accidents. Whenever an accident resulted in personal injury, Anglo-American law traditionally called for compensation based on a determination of fault. It soon became apparent that some extraordinary measures would have to be taken to protect the innocent motorists from the irresponsible ones, since the normal course of action in seeking compensation for injury was a cause of action against the party whose wrongful act caused the injury. Where, however, the tortfeasor was financially irresponsible the injured party would be left with his injury and nothing else.

Existing laws soon proved unable to cope with irresponsible motorists and to insure fair compensation. Consequently, state legislatures began taking approaches at solving the problem of the irresponsible motorist. None of the approaches taken, however, has been free of inherent weaknesses.

Part of the legislative efforts directed toward safety on the highways included requirements for registration and inspection of vehicles and for examination and licensing of operators. In addition, comprehensive regulations of traffic conditions and speed have been established, and extra-territorial service of process has been authorized on non-resident motorists involved in accidents within a particular state.[1] These efforts were aimed at preventing accidents but had little or no effect on the problem of compensation *after* an accident in which a financially irresponsible person was at fault.

Of the various approaches taken toward solving the problem of compensation for injury, the most widely followed approach has been the enactment of financial-responsibility laws. Indeed, by 1962 nearly all states had responded to the problem by enacting some form of financial-responsibility law, generally modeled on the Uniform Automobile Liability Security Act.[2] The pertinent provisions of such laws were that "where a financially irresponsible motorist was involved in an accident

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[1] Kesler v. Dept. of Pub. Safety, 369 U.S. 153, 158 (1962). For comparable laws in Mississippi *see* MISS. CODE ANN. §§ 8126-8285 (1956), MISS. CODE ANN. §§ 8091-8119 (1956) and MISS. CODE ANN. § 1437 (Supp. 1968).

[2] Kesler v. Dept. of Pub. Safety, 369 U.S. 153, 158 (1962). *See also* MISS. CODE ANN. §§ 8285-01 through 8285-41 (Supp. 1968).

and failed to respond to damages, his license to drive was automatically revoked and would not be restored unless and until he submitted proof of future financial responsibility . . . to the extent of the limits provided for in the law itself."[3]

The financial-responsibility laws were intended to discourage careless operation of motor vehicles,[4] to provide judgment creditors with additional means of recovery,[5] and to induce motorists to carry automobile liability insurance.[6] These basic goals have, however, eluded those charged with enforcing the laws. Indeed, the financial-responsibility laws have been the object of rather widespread criticism. Because the requirement for showing proof of financial responsibility did not arise until there had already been an accident, one of the major weaknesses of the original laws was the failure to make provisions by which the victim of the first accident could compel recovery.[7] The laws were then altered to require evidence of a program for compensating the original victim before the license or registration would be restored.[8] Installment programs were authorized for accomplishing this purpose.[9]

Another weakness of the early financial-responsibility laws was that they called for suspension or revocation of licenses and/or registration only upon the failure of the financially irresponsible motorist to respond in payment to an adverse judgment. For practical purposes this provision meant that the irresponsible motorist would likely continue to operate his vehicle without having his license or registration suspended. The reason is apparent. It would be unrewarding in most cases for a responsible motorist to bother with expending the time and money to obtain a judgment which he would probably be unable to collect. To correct this weakness a new provision was incorporated into the laws. In New Hampshire in 1937 a provision was added to that state's laws extending the requirement of showing proof of financial responsibility to every motorist *involved* in an accident in which there had been personal injury.[10] Upon failure to establish such security the motorist's license and/or registration would be suspended or revoked,

[3] Donldson, *Uninsured Motorist Coverage*, 34 INS. COUNSEL J. 57 (1967) [hereinafter cited as Donaldson].

[4] Kesler v. Dept. of Pub. Safety, 369 U.S. 153, 158 (1962).

[5] Comment, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL. L. REV. 545, 550 (1965).

[6] Donaldson, *supra* note 3.

[7] *Id.*

[8] *See, e.g.*, MISS. CODE ANN. § 8285-14 (1956).

[9] *See* MISS CODE ANN. § 8285-16 (1956).

[10] Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM L. REV. 300, 308 (1950) [hereinafter cited as Grad].

regardless of fault.[11] Other states followed suit, and the provision requiring proof of financial responsibility of any motorist *involved* in an accident became standard to the financial-responsibility laws.[12]

Another provision of the financial-responsibility laws came under attack in *Kesler v. Department of Public Safety*,[13] a case in which the constitutionality of a provision of Utah's financial-responsibility laws was questioned. The section provided that a discharge in bankruptcy was ineffective vis-a-vis the requirement that a judgment be satisfied before the license and registration would be reinstated. Since this law conflicted with the Federal Bankruptcy Act it was challenged on the basis of the supremacy clause. Mr. Justice Frankfurter, speaking for the United States Supreme Court, recognized the inroad which would be made on the consequences of bankruptcy if Utah's statute were upheld but deemed the exercise of this power vital to Utah's well-being and "wholly unrelated to the considerations which propelled Congress to enact a national bankruptcy law."[14] The constitutionality of the provision was upheld.

The individual states have had special problems with provisions of the financial-responsibility laws which were peculiar to those states. Mississippi, for example, originally provided that registration of the vehicle might be transferred to another member of the owner's family "so that the family [might] not be deprived of a mode of transportation."[15] The obvious ability of such an owner to transfer registration and return an uninsured, unsecured vehicle to the highway must have awakened the legislature, for in 1958 the section was altered considerably to close this loophole.[16]

Although financial-responsibility laws have not been regarded as a panacea for the problems they are intended to abate, criticism of the laws has not led state legislatures to abandon them. Some of the charges made against these laws are: (1) they do not segregate habitually

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[11] N.H. REV. LAWS, ch. 122 (1942).

[12] *See, e.g.*, GA. CODE ANN. § 92A-604 (1958) and MISS. CODE ANN. § 8285-04 (1956).

[13] 369 U.S. 153 (1962).

[14] *Id.* at 171.

[15] MISS. CODE ANN. § 8285-30 (1956).

[16] No person whose license or registration has been suspended or cancelled under the provisions of this act shall transfer title to the vehicle owned by him to any member of his immediate family until such person has furnished proof of financial responsibility as is otherwise required by the provisions of this act and same shall have been approved by the department. A member of a person's immediate family under the provisions hereof shall include any person related to the transferor by blood or marriage within the third degree computed according to the civil law and any person, whether related or not, residing within the same household as the transferor. MISS. CODE ANN. § 8285-30 (Supp. 1968).

careless drivers from those who drive more responsibly, (2) they have not caused an appreciably great increase in the number of motorists with voluntary insurance, (3) there has been no evidence of any decrease in the number of accidents, (4) there has been no showing of a relationship between the number of accidents and the number of license revocations or suspensions and (5) administrative weaknesses have made the laws virtually ineffective.[17]

In the face of such criticism, financial-responsibility laws have until recently been held valid and recognized as a proper exercise of the state's police power to "make reasonable regulations as to the use of its highways."[18] The laws have been upheld when charged with violation of the due process clause.[19] Michigan's financial-responsibility laws were attacked because they failed to distinguish between those owners and operators who were only casually involved in an accident and those who were involved through negligence or culpability. In response to the claim that such failure was a denial of equal protection, the Supreme Court of Michigan held unequivocally, "[t]he act in question does not violate the equal protection and due process clauses of the State and Federal Constitutions."[20]

Thus, until recently, the waters surrounding financial-responsibility laws have been placid, if not pellucid. In decisions announced May 24, 1971, and June 1, 1971, however, the United States Supreme Court struck disastrous blows to the validity and efficacy of such laws. In *Perez v. Campbell*,[21] the Court reversed its holdings in *Kesler v. Department of Public Safety*[22] and in *Reitz v. Mealey*.[23] The Court held unconstitutional the provision of financial-responsibility laws which provided for the ineffectiveness of discharge in bankruptcy in regard to judgments under the law. Mr. Justice White, in delivering the opinion for the majority, described the *Kesler* and *Reitz* decisions in part as "abberrational"[24] and as having "the effect of frustrating federal law."[25] He

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[17] Grad, *supra* note 10, at 306. It should be noted that the impetus for the uninsured motorist endorsement on liability insurance policies came from the failure of the financial-responsibility laws to accomplish their goals. Donaldson, *supra* note 3.

[18] Annot., 35 ALR2d 1011, 1012 (1954).

[19] Reitz v. Mealey, 314 U.S. 33 (1941). This decision was concerned primarily with due process in relation to the Federal Bankruptcy Act.

[20] Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471, 474, *cert. denied*, 323 U.S. 806 (1944).

[21] 39 U.S.L.W. 4618 (U.S. June 1, 1971).

[22] 369 U.S. 153 (1962).

[23] 314 U.S. 33 (1941).

[24] 39 U.S.L.W. 4618, 4623 (U.S. June 1, 1971).

[25] *Id.* at 4624.

further stated that those decisions were "not in harmony with sound constitutional principles . . . ."[26] The validity of this provision common to financial-responsibility laws was thereby deemed unconstitutional in violation of the Supremacy Clause.

Only one week earlier in *Bell v. Burson*,[27] Mr. Justice Brennan, speaking for the Court, struck a crippling blow to financial-responsibility legislation. Georgia's Motor Vehicle Safety Responsibility Act,[28] like that initiated by New Hampshire, provides for the suspension of the motor vehicle registration and license of any motorist whose motor vehicle was *involved* in the reported accident unless the motorist or owner provides the requisite security.[29] This provision was attacked as violative of due process, since it acted to deprive an uninsured or financially irresponsible motorist of a vested property right without having made a preliminary determination of fault. On this issue the Court said:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licenses. In such cases the licenses are not taken away without that procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'[30]

The Court found it clear that liability played a crucial role in Georgia's Act and determined that due process required a similar role in revocation or suspension under the Act. The Court held that procedural due process would be satisfied:

> [B]y an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee.[31]

The Court found it necessary for Georgia to provide such a forum before it could deprive a motorist of his driver's license or vehicle registration, but pointed out that there were alternate methods of complying with the requirements of due process. The Court suggested that Georgia could: (1) include consideration of liability in its present administrative hearing, (2) elect to postpone consideration to the *de novo*

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[26] *Id.*

[27] 39 U.S.L.W. 4607 (U.S. May 24, 1971).

[28] GA. CODE ANN. § 92 A-6 (1958).

[29] GA. CODE ANN. § 92A-604 (1958).

[30] Bell v. Burson, 39 U.S.L.W. 4607, 4609 (U.S. May 24, 1971).

[31] *Id.*

judicial proceedings, (3) elect to withhold suspension until adjudication of an action for damages brought by the injured party, (4) choose to abandon its present plan in favor of compulsory insurance plans, an unsatisfied judgment fund, or assigned claims plans or, (5) seek some other method of compliance.[32]

A comparison of the pertinent langauge of the Georgia Act and the Mississippi law reveals an almost verbatim similarity.[33] It is obvious,

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[32] *Id.* at 4610.

[33] Report required following accident.—The operator of every motor vehicle which is in any manner involved in an accident within this State in which any person is killed or injured or in which damage to the property of any one person, including himself, to an extent of $100 or more is sustained shall within 10 days after such accident report the matter in writing to the Director. Such report, the form of which shall be prescribed by the Director, shall contain information to enable the Director to determine whether the requirements for the deposit of security under section 92A-605 are inapplicable by reason of the existence of insurance or other exceptions specified in this Chapter. If such operator be physically incapable of making such report and is not the owner of the motor vehicle involved, the owner of the motor vehicle involved in such accident shall, within 10 days after learning of the accident, make such report. If the operator and owner are the same person and physically incapable of making such report within the required 10-day period, such person shall file the report as soon as he is able to do so, and, in the meantime, the Director has authority to request a report of the accident from any officer who investigated the accident. The owner of any parked motor vehicle which is involved in an accident shall file the report of same within 10 days after learning of the accident. The operator or the owner shall furnish such additional relevant information as the Director shall require. GA. CODE ANN. § 92A-604 (Supp. 1970).

Report required following accident

The operator of every motor vehicle which is in any manner involved in an accident within this State, in which any person is killed or injured or in which damage to the property of any one (1) person, including himself, in excess of Fifty Dollars ($50.00) is sustained, shall within twenty-four (24) hours after such accident report the matter in writing to the Department, in accordance with the laws of this State. Such report, the form of which shall be prescribed by the Department, shall contain information to enable the Department to determine whether the requirements for the deposit of security under Section 5 [§ 8285-05] are inapplicable by reason of the existence of insurance or other exceptions specified in this Act. Any written report of accident in accordance with Title 30, Chapter 2, Mississippi Code of 1942, being the Chapter on Motor Vehicles as amended or hereafter amended, shall be sufficient provided it also contains the information required herein. The Department may rely upon the accuracy of the information unless and until it has reason to believe that the information is erroneous. If such operator be physically incapable of making such report, an occupant in the motor vehicle at the time of the accident or the owner of the motor vehicle shall make such report. The operator, occupant or the owner shall furnish such additional relevant information as the Department shall require. MISS. CODE ANN. § 8285-04 (1956).

Security and financial responsibility required unless evidence of insurance —when security determined—suspension—exceptions.—Not less than 30 days after receipt by him of the report or notice of an accident which has resulted in bodily injury or death, or in damage to the property of any one person to an extent of $100 or more, the Director shall suspend the license and all registration certificates and all registration plates of the operator and owner of any motor vehicle in any manner involved in the accident unless or until the operator or owner has previously furnished or immediately furnishes se-

therefore, that the Mississippi statute contains the same basis for unconstitutionality that is found in the Georgia statute. The options available to Mississippi are identical to those open to Georgia. The options available, according to the Supreme Court, will be considered not only in light of the specific shortcomings announced by the Court but also with regard to the apparent disfavor into which financial-responsibility laws have recently fallen.

The Court has suggested that constitutionality can be restored by providing for an inquiry into fault at the administrative hearing level,[34]

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curity, sufficient in the judgment of the Director to satisfy any judgments for damages or injuries resulting from the accident as may be recovered against the operator or owner by or on behalf of any person aggrieved or his legal representative, but in no event in any amount less than the combined amount of damages, for both personal and property injury, sworn to in the report or notice of the accident filed by the aggrieved party, and unless such operator or owner shall give proof of financial responsibility for the future as is required in Section 92A-615.1. If the operator or owner is a nonresident, the suspension shall apply to the privilege and operation or use of motor vehicles within this State. The director shall not apply the provisions of this section against a resident of this State involved in an accident with a nonresident of this State when the damage is less than $300 except upon the written request of any party in interest. An adjudication or discharge in bankruptcy shall not relieve the operator or owner from furnishing security as provided herein or from the other provisions of this Chapter. GA. CODE ANN. § 92A-605 (a) (Supp. 1970).

Security and proof of financial responsibility required unless evidence of insurance—when security determined—suspension—exceptions.

(a) If twenty (20) days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death, or damage to the property of any one (1) person in excess of Fifty Dollars ($50.00), the Department does not have on file evidence satisfactory to it that the person who would otherwise be required to file security under Subsection (b) of this Section has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the Department shall determine the amount of security which shall be sufficient in its judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each operator or owner.

(b) The Department shall, within sixty (60) days after the receipt of such report of a motor vehicle accident, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, and if such operator is a non-resident the privilege of operating a motor vehicle within this State, and if such owner is a non-resident the privilege of the use within this State of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the Department and shall also furnish proof of financial responsibility; provided notice of such suspension shall be sent by the Department to such operator and owner not less than ten (10) days prior to the effective date of such suspension and shall state the amount required as security. Where erroneous information is given the Department with respect to the matters set forth in Subdivision 1, 2 and 3 of Sub-section (c) of this Section, it shall take appropriate action as hereinbefore provided, within sixty (60) days after receipt by it of correct information with respect to said matters. MISS. CODE ANN. § 8285-05 (a) and (b) (Supp. 1968).

[34] Bell v. Burson, 39 U.S.L.W. 4607, 4610 (U.S. May 24, 1971).

thereby retaining the financial-responsibility law virtually intact. The only administrative hearing evident under Georgia's statute is that of the director to determine whether the involved motorist can meet the security requirements imposed by the Act,[35] although the Act does provide for hearings "upon request of persons aggrieved by orders or acts . . ."[36] of the administrator of the Act. To accomplish the purpose of the *Bell* decision, however, it is apparent that the inquiry must be made before any orders or acts may have lasting effect. This approach would entail determination of sufficient facts by the administrator of the law to enable him to decide whether there was a possibility that the amounts of the claims made would be awarded. It is questionable whether the requirement to make such determination would overburden the administrator of the laws. It is also questionable whether such a compliance would even be desirable in light of the abject failure of financial-responsibility laws to accomplish their intended results, especially since the recent evaporation of the laws' most effective characteristics.

Under Georgia's and Mississippi's laws, whenever the aggrieved motorist is dissatisfied with the result of the hearing provided for him, he has the right to appeal to the trial court of the county of his residence.[37] The Supreme Court has indicated that consideration of the motorist's liability may be postponed until this *de novo* proceeding and still provide the due process demanded by the fourteenth amendment.[38] Having decided to retain the financial-responsibility laws, the advantage of this approach to compliance is that the burden of determining possibility of liability would be shifted, in Missssippi, from the State of Mississippi to the more numerous county and circuit courts. In addition, these courts are better equipped to make such a decision based on past experience. It seems that the disadvantages of this approach to compliance are twofold: (1) from the point of view of the state this procedure would increase the already heavy work load of the county and circuit courts and (2) from the aggrieved motorist's point of view the costs of having an administrative hearing and then proceeding with an appeal would be prohibitive in most cases.

A third approach to compliance, suggested by the Court, would be to postpone suspension of licenses and registration until a judgment has been returned against the motorist in a suit brought by the injured party. The obvious effect of such an approach would be to return

[35] GA. CODE ANN. § 92A-605 (Supp. 1970).

[36] GA. CODE ANN. § 92A-602 (1958). For the same provision for a hearing see § 8285-02 MISS. CODE ANN. (1956).

[37] *Id.*

[38] Bell v. Burson, 39 U.S.L.W. 4607, 4610 (U.S. May 24, 1971).

financial-responsibility laws to their pre-1937 state, complete with the severe weakness of having no practical effect on the financially irresponsible motorist when the injured party resigns himself to his losses and fails to file suit. Such a law would be tantamount to no law at all.

These three alternatives have the common characteristic of retaining the basic financial-responsibility scheme. In light of the inherent weaknesses and multitudinous problems associated with retention of such a scheme, it seems only logical that full weight should be given consideration of abandoning it completely in favor of more viable and efficaceous programs. If abandonment should seem too drastic, consideration should at least be given to the possibility of supplementing such a scheme with more effective programs.

In *Bell*, the Court suggested an unsatisfied judgment fund as a possible alternative to financial-responsibility laws.[39] At present, only five states have adopted laws establishing and regulating unsatisfied judgment funds.[40] The purpose of New Jersey's law is generally:

> [T]o provide a measure of relief for persons who sustain losses or injury inflicted by financially irresponsible or unidentified owners or operators of motor vehicles, where such persons would otherwise be remediless.[41]

Maryland's law was expressly modeled on that of New Jersey.[42] Similar purposes have been expressed for the other states' laws.[43]

The law operates by creating a fund to which certain unsatisfied judgment-creditors can turn in order to seek some compensation for their injuries. The funds are created and maintained by various means. In North Dakota, which modeled its law on that of Manitoba,[44] the fund is maintained by having each motor vehicle registrant pay, in addition to registration fees, one dollar for each motor vehicle he registers.[45] Michigan's approach is similar, but there the registrant of an uninsured vehicle must pay $35 into the fund instead of the $1 required of an insured vehicle.[46] New Jersey maintains its fund by having the

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[39] *Id.*

[40] MD. ANN. CODE art. 66½, § 7-603 (1970); MICH. STAT. ANN. § 9.2803 (Supp. 1971); N.J. STAT. ANN. § 39:6-61 (1961); N.Y. INS. LAW § 600 (McKinney 1966); and N.D. CENT. CODE § 39-17-02 (Supp. 1969).

[41] Corrigan v. Gassert, 27 N.J. 227, 142 A.2d 209, 212 (1958).

[42] Tracy v. Unsatisfied Claim & Judgment Fund, 255 Md. 674, 259 A.2d 276 (1969); Mullins v. Thorne, 254 Md. 434. 255 A.2d 409 (1969).

[43] *See, e.g.*, Note, *The Problem of the Financially Irresponsible Motorist—New York's MVAIC*, 65 COLUM. L. REV. 1075 (1965); Bergesen, *The North Dakota Unsatisfied Judgment Fund*, 29 N.D.L. REV. 123 (1953) [hereinafter cited as Bergesen].

[44] Bergesen, *supra* note 43.

[45] N.D. CENT. CODE § 39-17-01 (Supp. 1969).

[46] MICH. STAT. ANN. § 9.2803 (Supp. 1971).

director of the fund estimate an amount needed for the year and charging an additional fee not to exceed $50 for each uninsured vehicle registered. In addition, if necessary, any excess needed for the operation of the fund is assessed against the insurers doing business in the state.[47] Maryland has by far the most complex system of maintaining its fund. It requires at registration an extra fee of $8 for every uninsured vehicle registered and $1 extra for every insured vehicle. It also requires insurance companies to contribute one-half of one percent of their net direct written premiums and subjects them to additional assessments whenever additional funds are needed.[48] New York, which already has compulsory liability insurance,[49] maintains its fund by assessing the insurance companies in the state on the basis of the amount of business done.[50]

If operation of the fund were mechanical once it was established, perhaps more states would have adopted it. The fund is, however, the source of a plethora of additional problems only one of which is determination of who the certain people are who come within the protection of the indemnity funds.[51] Questions have also been raised concerning the type of accident which will give rise to coverage by the fund.[52] In addition, "due regard must be given to protect the Fund against possible fraud or abuse."[53]

There are technical considerations to be met in the operation of the fund in order for the people intended to be protected to qualify for payment. These considerations sometimes stymie the purposes of the law. On one such occasion a New York court said that such a result "points out a gap in the [unsatisfied judgment fund] which itself was designed to close the gaps in [financial-responsibility laws]."[54]

Because of the vulnerability to fraud inherent in the fund, special provisions have been incorporated into the acts to deal with default judgments. In all cases notice must be given of the claim, and a representative of the fund or of the state must be given the opportunity to defend the action.[55] Here, too, it seems the law has allowed itself

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[47] N.J. STAT. ANN. § 39:6-63 (Supp. 1971).

[48] MD. ANN. CODE art. 66½, § 7-603 (1970).

[49] N.Y. VEH. & TRAF. LAW § 312 (McKinney 1970).

[50] N.Y. INS. LAW § 607 (McKinney Supp. 1971).

[51] Annot., 10 ALR3d 1166 (1966).

[52] Annot., 7 ALR3d 822 (1966).

[53] Bears v. Wallace, 270 A.2d 731, 733 (N.J. Sup. Ct. 1970).

[54] Roeder v. MVAIC, 248 N.Y.S.2d 512, 515 (1964).

[55] MD. ANN. CODE art. 66½, § 7-617 (1970); MICH. STAT. ANN. § 9.2808 (Supp. 1971); N.J. STAT. ANN. § 39:6-75 (1961); N.Y. INS. LAW § 614 (McKinney 1966); N.D. CENT. CODE § 39-17-01 (1960) The right to defend must have been available even though the fund generally becomes the assignee of the uncollected judgment. *See, e.g.*, N.Y. INS. LAW. § 616 (McKinney 1966).

great lattitudes within which to defeat itself. Such a program in North Dakota, for example, is tantamount in some cases to the defendant's buying the legal services of the state's attorney general for one dollar.

Until the problems of unsatisfied judgment funds have been satisfactorily resolved, there appears little reason for Mississippi to pursue this avenue of approach to compliance with due process requirements.

Another alternative to the present financial-responsibility laws which the Supreme Court has suggested is an assigned claims plan. This is, of course, a feature of the Keeton-O'Connell Basic Protection plan.[56] Under this plan the fault system is characterized as inadequate to cope with today's world. Mr. Keeton has questioned whether the fault system is an impractical criterion for liability.[57] Among the cumulative pragmatic difficulties with the fault system he includes:

> [T]he deterioration of evidence between the time of the accident and a long delayed trial, the paucity of competent observers of the crucial event, and the extra burdens that split-second time sequences place on the capacity of witnesses to perceive, recall, and narrate.[58]

Critics of the proposed Basic Protection plan are numerous and have characterized it as a violation of "the most basic principles of personal responsibility and fair play,"[59] a "disguised additional surtax,"[60] and "a compulsory form of excess accident and health insurance. . . ."[61] Proponents are equally vociferous and characterize the proposal as promotive of an eventual solution to the automobile accident problem with providing compensation.[62]

This particular alternative or one basically similar seems to be too speculative and too untested to be recommended presently as an attractive approach to compliance with the due process requirement of the fourteenth amendment. Indeed, after a great deal of research and analysis one major insurance company executive suggested that the plan creates more problems that it solves.[63]

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[56] *See, e.g.*, Keeton and O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 HARV. L. REV. 329 (1964).

[57] R. KEETON, VENTURING TO DO JUSTICE (1969).

[58] *Id.* at 129.

[59] Comment, *The Keeton-O'Connell Plan: A Catalyst in the Search for a Workable Solution to the Automobile Accident Compensation Problem*, 17 BUFF. L. REV. 849, 860 (1968) *quoting* SARGENT, *Exploding a Myth*, in Justice and the Adversary System 127 (Am. Trial Law. Ass'n ed. 1967).

[60] Julien, *Keeton-O'Connell: Myth or Panacea*, 40 N.Y.S.B.J. 256, 257 (1968).

[61] Hold, *Basic Protection For The Traffic Victim—The Keeton-O'Connell Proposal "Too Far Or Not Enough,"* 35 INS. COUNSEL J. 120, 121-22 (1968).

[62] *Id.* at 120-21; Comment, *supra* note 59.

[63] Comment, *supra* note 59, at 861.

Although the Keeton-O'Connell plan calls for compusory insurance, this alternate method of compliance as recommended in *Bell* is to be distinguished from the other recommendation made specifically for compulsory insurance. Traditionally, compulsory insurance has meant that in order for a motorist to register his vehicle he must first show proof of liability insurance for that vehicle. As early as 1925 Massachusetts enacted a law requiring registration applications to contain a certificate of financial responsibility issued by an insurance company authorized to issue a motor vehicle liability policy in the state or by a surety company authorized to do business in the state.[64] In addition, the certificate must run for a period at least coterminous with the registration desired before the vehicle would be registered.[65] The compulsory liability statutes were enacted only after an intensive legislative investigation into the problems resulting from negligent operation of motor vehicles on the highways.[66] The Supreme Judicial Court of Massachusetts held that:

> The purpose of the compulsory motor vehicle insurance law is not, like ordinary insurance, to protect the owner or operator alone from loss, but rather is to provide compensation to persons injured through the operation of the automobile insured by the owner.[67]

In *Bell* the Supreme Court recognized the validity of such laws by saying that a statute which barred the issuance of licenses to all motorists, who did not either post security or carry insurance, would not violate the fourteenth amendment under prior cases.[68] Massachusetts has, however, been joined only by New York[69] and North Carolina[70] in adopting the compulsory insurance approach to problems of compensation for injuries received in highway accidents.

Perhaps the hesitancy of other states to enact similar legislation is best explained by the stated purpose of the New York law establishing an unsatisfied judgment fund.[71] The legislature recognized a coverage gap where death or injury to the motorist was caused by: (1) uninsured vehicles registered in states other than New York, (2) unidentified hit-and-run vehicles, (3) New York registered vehicles on which the insurance had lapsed or been terminated, (4) stolen vehicles, (5) motor ve-

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[64] MASS. ANN. LAWS ch. 90, §§ 1A and 34A (1967).

[65] *Id.*

[66] Caccavo v. Kearney, 286 Mass. 480, 190 N.E. 817 (1934).

[67] Wheeler v. O'Connell, 297 Mass. 549, 9 N.E.2d 544, 546 (1937).

[68] Bell v. Burson, 39 U.S.L.W. 4607, 4609 (U.S. May 24, 1971).

[69] N.Y. VEH. & TRAF. LAW § 312 (McKinney 1970).

[70] N.C. GEN. STAT. § 20-309 (1965).

[71] N.Y. INS. LAW § 600 (McKinney 1966).

hicles operated without the owner's permission, (6) insured vehicles for which the insurer disclaims liability or denies coverage and (7) unregistered vehicles.[72]

The compulsory insurance laws also involve administrative problems arising from cancellation, lapsing or termination or the insurance coverage or security. Since the laws require the coverage to be at least coterminous with the registration, additional procedural requirements of notice of termination and relinquishment of licenses and tags are a necessity if the laws are to be effective. A basic argument leveled against compulsory insurance laws has been that it makes motorists more accident prone.[73] Not only is this argument unfounded, but the opposite conclusion may well be true.[74]

It appears, therefore, that compulsory liability insurance of the type in existence in the earlier part of the century was no panacea. In 1957, however, the insurance industry responded to the obvious shortcomings of financial-responsibility laws with the introduction of the uninsured motorist endorsement to its standard automobile liability insurance policy.[75] Although the endorsement is still novel enough to be the source of considerable confusion concerning the parties covered and the remedies available,[76] the intent of the endorsement to solve "the problem of compensating innocent persons who sustain injuries from the negligence of an uninsured, insolvent, or unidentified motorist . . ."[77] indicates that proper construction should fill the gaps of the compulsory insurance laws. In fact, the endorsement was specifically "[*d*]*esigned* to further close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation. . . ."[78]

Another possible objection to compulsory insurance laws is the argument that some people simply cannot afford to pay for insurance, either because of their very limited income or because of elevated costs due to a bad driving record. The answer to this is one of utility. If the costs of insurance are excessive because of a past record of bad driving, does society really want that person on the highway? The ques-

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[72] *Id.*

[73] Comment, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL. L. REV. 545, 547 (1965).

[74] *Id.*

[75] Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUNSEL J. 57 (1967).

[76] Note, *Insurance—Determination of Legal Entitlement Under Uninsured Motorist Endorsement*, 42 MISS. L.J. 128 (1971); Comment, *The Uninsured Motorist Endorsement—Some Problems of Construction*, 42 TUL. L. REV. 352 (1968); Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U. L. REV. 497 (1967); Annot., 79 ALR2d 1252 (1961).

[77] Comment, *supra* note 76, at 352.

[78] Annot., *supra* note 76, at 1252 (emphasis added).

tion with regard to the indigent is not so easily answered. A balancing must be made between the advantages to society by having all vehicles properly insured and the disadvantages to the individual deprived of transportation and to society which may be called upon to support him. The balancing is a problem for legislative consideration.

Under present Mississippi law all automobile liability insurance policies written in this state must contain uninsured motorist coverage unless the insured specifically waives that coverage.[79] If compulsory insurance laws were enacted, it would appear that society would be benefited by the achievement of providing available compensation for the individual, and the individual would be protected even from unknown motorists if he so desired.

Compulsory insurance laws require that insurance be made available to everyone regardless of past driving records or other such considerations. This condition to such laws would require no added legislation, however, since Mississippi laws already provide for an assigned risk plan through which insurance is made available to persons who are "unable to secure it through ordinary methods. . . ."[80]

Because of the apparent ineffectiveness of financial-responsibility laws, their procedural unconstitutionality, the disfavor into which they have fallen, and the myriad other problems connected with such laws, it is suggested that the answer to both constitutionality and solution of injury compensation will not be found merely by altering the financial-responsibility laws to comply with due process. Of all the suggested alternatives that one least odious and plagued with the least problems appears to be compulsory insurance. This is especially true since uninsured motorist coverage has filled most of the gaps in compulsory insurance laws.

There is, however, one major coverage gap left by uninsured motorist endorsements. The coverage is limited to personal injury compensation. The motorist, therefore, who suffers property damage at the hands of a hit-and-run driver, a stolen vehicle, an uninsured out-of-state vehicle or an unregistered vehicle is no better off than he would be under existing laws. A full solution to this problem would require the establishment of an unsatisfied judgment fund, a solution which is itself too fraught with problems to be recommended at this time.

Compulsory insurance has other advantages as well. Not only does it increase the protection of the average motorist far beyond present laws without appreciably increasing bureaucracy and potentiality for

[79] MISS. CODE ANN. § 8285-51 (Supp. 1968).
[80] MISS. CODE ANN. § 8285-35 (Supp. 1968).

fraud, but it lends itself toward more effective enforcement. Since the coverage or security must be coterminous with registration, any vehicle without coverage will not be issued registration plates, and upon termination of coverage the plates of those properly registered must be surrendered. Obviously law enforcement officers are more able to detect the absence of registration plates than the absence of a driver's license or insurance.

Probably no proposal will cure all the defects of traffic safety control. It is submitted, nevertheless, that compulsory insurance laws offer the most effective and least complex solution to the problem of compensating the innocent motorist for injuries suffered.

Gregory Boyd

STUDENT NOTES

MUNICIPAL COLLECTIVE BARGAINING: IS IT POSSIBLE IN MISSISSIPPI?

1. *Introduction*

Employee activism in the public sector has increased drastically in recent years and, although it has been universally recognized that public employees do not have the right to strike, 42 public employee strikes occurred in 1965.[1] There were 142 strikes in 1966[2] and 181 in 1967.[3] During 1968, strikes by public employees increased to approximately 250,[4] nearly double the number recorded the previous year.

Today, about two-thirds of all governmental workers are employed at the local level.[5] During the period 1963 through 1969, the number of employees at the state and local level increased from 6.8 million[6] to 9.4 million.[7] It is estimated that by 1975, 15 million persons will be working for some level of government.[8] A conservative estimate of the number of public employees belonging to labor unions is 2 million.[9] Employees in all branches of government are joining or organizing unions at the rate of approximately one thousand per day.[10]

It is apparent that the long fragmented ranks of those employed in the public sector are closing. Regardless of whether or not they have a legal right to organize, public employees are demanding that they be recognized and that the governmental employers bargain with those representatives chosen by the employees. According to public employee unions, the major cause of strikes today is the refusal of government to recognize and bargain with the employees' chosen representatives.[11] One of the primary goals of public employee unions and organizations is to place collective bargaining by public employees on a solid legal basis.[12]

At least thirty states now have laws endorsing to some degree the

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[1] Wollett, *Public Employee Bargaining and the Constitution*, in LABOR LAW DEVELOPMENTS 1970 2 (1970) [hereinafter cited as Wollett].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] 1 BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 605 at 429 (89th Ed. 1968).

[6] LABOR RELATIONS YEARBOOK—1968 at 451 (1969).

[7] LABOR RELATIONS YEARBOOK—1969 at 726 (1970).

[8] Wollett, *supra* note 1, at 1.

[9] *Id.*

[10] Speech by Director Counts of the Federal Mediation and Conciliation Service to the Seminar of Collective Bargaining, Canisius College, Buffalo, New York, reported in LABOR RELATIONS YEARBOOK—1969 at 677, 680 (1970).

[11] *Public Employee Disputes Settlement: Union View*, LABOR RELATIONS YEARBOOK —1969 at 201, 202 (1970).

[12] Usery, *Labor Climate Today*, 22 NYU CONFERENCE ON LABOR 3, 8 (1970).

right of certain classes of, or all of, their state and local employees to bargain collectively.[13] Several other states are considering legislation which will permit collective bargaining by public employees.[14] In addition, the right of public employees to bargain collectively has been recognized in states which do not have either a provisionary or a prohibitory statute.[15]

Mississippi has not enacted legislation which would allow or prohibit public employees and municipalities the right to engage in collective bargaining. The purpose of this discussion is to examine the power of local governments in Mississippi to engage in collective bargaining in the absence of legislative authority. Since neither the legislature nor the courts have considered the question, an examination will be made of the background of public employee organizations, collective bargaining, and recent decisions from other jurisdictions concerning public sector collective bargaining in the absence of statute.

II. *Background of Employee Collective Bargaining and Organization in the Public Sector*

Any discussion of the right or power to bargain collectively must necessarily involve some consideration of the right of public employees to organize, since the normal sequence of events requires the latter before the former.

In recent years, the rights of public employees to organize and join labor unions for the purpose of collective representation have received substantial recognition. Prior to the 1950s, a few court decisions indicated, usually by way of dicta, that in the absence of prohibitory legislation, some common law privilege of persons in the public service to organize might exist.[16] By far the most prevalent view, however, was that any union membership or activity by public employees or certain classes of public employees was against the public interest and should be prohibited.[17] Statutes expressly recognizing the rights of employees to organize and join labor unions have been held not to include public employees.[18] Recently, however, those statutes prohibiting organization

[13] Speech by Arvid Anderson, Chairman, Office of Collective Bargaining, New York, N.Y., to symposium on "Labor-Management Relations in the Public Sector" at the University of Kentucky Nov. 14, 1969, reported in LABOR RELATIONS YEARBOOK—1969 at 310, 311 (1970).

[14] *Id.*

[15] *Id.*

[16] *See, e.g.*, Hagan v. Picard, 171 Misc. 475, 12 N.Y.S. 2d 873, *aff'd* 258 App. Div. 771, 14 N.Y.S. 2d 706 (1939); Cleveland v. Association, 30 Ohio Ops. 395 (C.P. 1945); Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1945).

[17] *See, e.g.*, Hickman v. City of Mobile, 256 Ala. 141, 53 So. 2d 752 (1951); People v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917); City of Jackson v. McLeod, 199 Miss. 676, 24 So. 2d 319, *cert. denied*, 328 U.S. 863 (1946).

[18] *See, e.g.*, Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); Local 654, Miami Water Works v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946).

or union membership by public employees have come under attack, and at least one has been held unconstitutional.[19] The court found the statute in question violated the public employees' rights under the first and fourteenth amendments to the Constitution of the United States, and also found that there was no valid state interest preserved by denying the public employees involved the right to organize or join labor unions.

While the right of employees in the public sector to organize for the purpose of representation appears to be on the way to becoming an established principle, the right to bargain collectively is still in the developmental stage. The same court which found the state statute prohibiting public employee organization to be unconstitutional, found another state statute prohibiting contracts between state and local governments and labor unions representing public employees valid. The court was of the opinion that no constitutional right existed which entitled one to have a contract with another who does not want it; therefore it was just a logical extension of the argument to say a state had the power to legislate against contracts which it did not want.[20]

III. *The Power to Contract and Collective Bargaining*

Considering the recent increase in public employee strikes,[21] and the rate public employees are organizing and joining labor unions, particularly at the local level, it would seem prudent for local governments in states without statutory provision for some form of collective bargaining to develop some procedure for legally negotiating with their employees. Some writers advocate that a legal basis already exists for most municipalities under the general power to contract granted them by the states.[22] Mississippi grants to every municipality in the state the power to "make all contracts and do all other acts in relation to the property and affairs of the municipality necessary to the exercise of its governmental, corporate, and administrative powers."[23]

With respect to collective bargaining in the absence of an enabling statute, the primary barrier has been a refusal by the courts and local governments to concede that local governments have the power to bargain collectively. The thesis is generally accepted that local governments are the creations of the sovereign states and receive all of their powers from the states.[24] Local governments have traditionally based their refusal to recognize or bargain collectively with public employees on the ground that they are limited to the exercise of powers expressly

[19] Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C. 1969), North Carolina statute declared unconstitutional; *see also* AFSCME v. Woodward, 406 F.2d 137 (8th Cir. 1969).

[20] 296 F. Supp. at 1077, North Carolina statute prohibiting collective bargaining by state or local employees constitutional.

[21] *See* notes 1-10 *supra*.

[22] Dole, *Public Employee Bargaining*, 54 IOWA L.R. 539 (1969) [hereinafter cited as Dole].

[23] MISS. CODE ANN. § 3374-112 (Supp. 1970).

[24] E. MCQUILLAN, 2 MUNICIPAL CORPORATIONS § 10.03 (3d ed. 1966).

granted to them by the states, or those powers which are necessarily or fairly implied in, or incident to, the expressly as granted,[25] powers and that no power to bargain collectively has been conferred by the state. Coupled with the idea that local governments have only those powers conferred by the states is the view that matters concerning public employees are legislaive in nature. Any attempt to collectively bargain would necessarily involve a delegation of legislative power. Since it is a familiar principle of constitutional law that the legislature may not delegate its legislative powers, the whole procedure would be void.[26]

Do the previously expressed objections to public employee collective bargaining in the absence of statute preclude Mississippi municipalities, under their general power to contract, from negotiating and entering into agreements with municipal employees?

The first objection which should be considered is whether a collective bargaining agreement negotiated and executed under a general power to contract should be void because of an illegal delegation of power by the municipality to its employees.[27] To determine whether this objection carries the weight initially suggested, it is necessary to consider the nature of collective bargaining as the term is used in the public sector. Essentially, public employee collective bargaining involves the negotiation of terms and conditions of employment between a public employer and a representative of its employees.[28] Parties to the collective bargaining process neither agree in advance to reach an agreement concerning the subject matter under consideration, nor do they agree to accept the determination of some third party as would be the case in arbitration proceedings. When the actual process of collective bargaining is analyzed, it is clear that any charge of an unauthorized delegation of power is without merit. Since the local government is free to accept or reject an employee representative's proposals,[29] it does not delegate its legislative authority by entering into negotiation or agreement with the representative.[30] Properly viewed, any agreement entered into between the public employer and its employees will be the result of legislative discretion rather than the delegation of legislative power.[31] At least one observer has noted the irony of court decisions which hold that the power to engage in collective bargaining would necessarily lead to an intolerable delegation of governmental dis-

[25] *See, e.g.*, Local 654, Miami Water Works v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947); Weakley County Mun. Elec. Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957).

[26] City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947).

[27] *Id.*

[28] Dole, *supra* note 22, at 543.

[29] Local 266, IBEW v. Salt River Project Agric. Improv. & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954); *accord*, Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); Civil Service Forum v. New York City Transit Authority, 4 App. Div. 2d 117, 163 N.Y.S.2d 476 (2d Dept. 1957) *aff'd mem.*, 4 N.Y.2d 866, 150 N.E.2d 705, 174 N.Y.S.2d 234 (1958).

[30] Dole, *supra* note 22, at 552.

[31] *Id.*

cretion.[32] The decisions would deny public employer discretion in the name of preserving discretion.[33]

The other major objection is that local governments are limited to the exercise of those powers expressly granted or necessarily implied, and the state has not granted the power to engage in collective bargaining.[34] It has been universally recognized that under the general power to contract granted by the state, a municipality has the implied authority to enter into individual employment contracts for the performance of municipal functions.[35] From a legal standpoint, given the right of a municipality to contract with an individual employee, there appears to be little if any reason to hold *ultra vires* the power to contract—negotiate and bargain collectively—with one person representing many employees.[36] As was stated by one court:

> To say that the District is powerless to enter into one agreement covering the terms of employment of many of its employees but has the power to enter into approximately 750 separate negotiations would be incongruity beyond reason.[37]

Another frequently expressed objection is that collective bargaining contracts made by incumbent officials bind their successors.[38] The Supreme Court of Mississippi has held that an individual employment contract may not be enforced beyond the term of office of town officers making the contract.[39] In most cases, however, this obstacle may be easily overcome since most collective bargaining agreements are evaluated periodically or expire at a pre-determined date. This could be scheduled to coincide with the change of municipal administrations.

The question of whether or not the establishment of local governmental agencies to handle the administration of public employee affairs precludes collective bargaining should be given some consideration.

Mississippi has provided by statute that the governing body of a municipality shall have the power and authority to prescribe the duties and fix the compensation of all public officers and employees.[40] While the language of the statute clearly vests authority in the local legislative body to determine the wages and working conditions of municipal employees, there is nothing to indicate that the municipality must follow any particular procedure in making that determination. Although

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[32] *Id.*

[33] *Id.*

[34] *See* note 25 *supra.*

[35] E. McQUILLAN, 10 MUNICIPAL CORPORATIONS § 29.05 (3d ed. 1966).

[36] Note, *Municipal Collective Bargaining Agreements: Are They Ultra Vires?*, 20 CASE W. RES. L. REV. 637, 643-44 (1969).

[37] Local 266, IBEW v. Salt River Project Agric. Improv. & Power Dist., 78 Ariz. 30, 275 P.2d 393, 399 (1954).

[38] Dole, *supra* note 22, at 547.

[39] Tullos v. Town of Magee, 181 Miss. 288, 179 So. 557 (1938).

[40] MISS. CODE ANN. §§ 3374-37, 3374-53, 3374-54 (Supp. 1970).

the statute provides for a Civil Service Commission,[41] it is not applicable to all municipalities in the state,[42] and its functions and powers are limited primarily to the area of public administration rather than negotiation.[43] It would appear that the existence of a Civil Service Commission in any particular municipality would not preempt the matter of collective bargaining with those subject to civil service.

IV. *Recognition of Employee Representatives*

Given the power of a municipality to enter into collective bargaining with its employees, certain problems arise with regard to negotiations with the employees' representatives. Collective bargaining by its very definition involves the recognition by management of the representative chosen by the employees. In the past the recognition of a public employee representative has been viewed by some as an abuse of discretion if all employees concerned were not already supporters of the chosen representative.[44] Recent cases indicate that the courts are trying to be more pragmatic and are adopting a position somewhat similar to that taken in the private sector toward employee representatives. As long as it is evident that at least a majority of the employees support the chosen representative, he may represent the employees, but also must negotiate for non-member employees.[45] As an alternative, it has also been held that if any employee chooses not to have the union represent him, the local government unit is under the same obligation to negotiate with the employee as it is with the union representative.[46] This is assuming, of course, that the municipality has recognized and agreed to negotiate with the union representative.

In regard to exclusive representation and recognition, the provisions of the Mississippi Constitution[47] and the Mississippi Right to Work

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[41] MISS. CODE ANN. § 3825-01 (1956).

[42] MISS. CODE ANN. § 3825-30 (Supp. 1970).

[43] MISS. CODE ANN. § 3825-06 (1956).

[44] Dole, *supra* note 22, at 547.

[45] *Id.*

[46] *See, e.g.*, Chicago Div. of Ill. Educ. Ass'n. v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); Civil Service Forum v. New York City Transit Authority, 4 App. Div. 2d 117, 163 N.Y.S.2d 476 (2d Dept. 1957).

[47] MISS. CONST. art. 7, § 198-A (1960), states:

> Section 198-A. It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly on any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. No employer shall require any person, as a condition of em-

Law[48] should be noted. Basically, these laws make it illegal for any employer and union to enter into an agreement which would give the union an employment monopoly in any enterprise. Although the provisions of the Mississippi Constitution, because of their location in the constitution, appear to apply only to private corporations and unions, the Right to Work Law, containing the same language as the constitution, is not restricted on its face to the private sector. For this reason it would probably be prudent for any municipality contemplating entering into a collective bargaining agreement with its employees to consider itself under the same regulations as those employers in the private sector.

V. *Recent Court Decisions*

Several recent state court decisions have adjudicated the precise question of whether or not collective bargaining with public employees in the absence of express statutory permission is proper and whether the agreements reached are enforceable. Two of those decisions will be considered here.

Louisville Fire Fighters v. Burke[49] was a class action brought by

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ployment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reason of such denial or deprivation of employment. MISS. CONST. art. 7, § 198-A (1960).

[48] MISS. CODE ANN. § 6984.5 (Supp. 1970), states:

> § 6984.5. Denial or abridgement of work.—(a) It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.
>
> (b) Any agreement or combination between any employer and any labor union or labor organization whereby any person not a member of such union or organization shall be denied the right to work for an employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be an illegal combination or conspiracy and against public policy.
>
> (c) No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.
>
> (d) No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.
>
> (e) No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.
>
> (f) Any person who may be denied employment or be deprived of continuation of his employment in violation of any paragraph of this section, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this state such actual damages as he may have sustained by reason of such denial or deprivation of employment. . . . MISS. CODE ANN. § 6984.5 (Supp. 1970).

[49] 75 LRRM 2001, No. C128962 (Ky. Cir. Ct., Chan. Br., Jefferson County June 2, 1970).

unions representing employees of Louisville, Kentucky, against the Mayor and other representatives of the city. A declaratory judgment was sought questioning the legality of several ordinances passed by the board of aldermen authorizing collective bargaining by city employees and ratifying two collective bargaining agreements entered into by the parties.

The plaintiffs charged the mayor and other defendants with violating their rights under the fifth and fourteenth amendments to the Constitution of the United States by refusing to comply with the ordinances passed by the board of aldermen. The defendants put into issue the legality of their actions by asking the court to pass on the power of the board of aldermen to enact the ordinance in question as well as the legality of the ordinances enacted.

The questions asked were of first impression in Kentucky. It is interesting to note that the court, in its deliberation, apparently gave little consideration to the older decisions construing the power of a municipality to enter into collective bargaining in the absence of statute, but looked to the most recent decisions from other jurisdictions.[50]

In finding that the board of aldermen did have the requisite power to provide for collective bargaining, the court reasoned that, although there was no statute specifically granting the power, there were none that prohibited a contractual arrangement such as the one in question. The court also found that collective bargaining by public employees was not against the public interest nor adverse to public policy. In making this determination, the court noted that throughout the past several years, attitudes concerning public employees have been changing and it was time for public employees to have a voice in the consideration of wages, working conditions, fringe benefits and social problems. Significance also seemed to be attached to the fact that, in recent years, the legislature had seen fit to provide for various programs benefiting municipal employees. The court intimated that legislative enactments of this type indicate that public policy approves the recognition of public employees as a collective group.

The Louisville Fire Fighters case has yet to be affirmed on appeal, but it does provide an indication of the matters considered by enlightened courts in connection with recognizing the power of municipalities to engage in collective bargaining.

Perhaps the most comprehensive examination of public employee collective bargaining in the absence of statute was undertaken by the Supreme Court of Iowa in *State Board of Regents v. Local 1258, United Packing House Food and Allied Workers.*[51] It should be noted that this case involved an agency of the state rather than a municipal government, but the court apparently did not make any distinction in applicable principles concerning the powers involved.

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[50] *See, e.g.*, Chicago Div. of Ill. Educ. Ass'n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); Local 611, IBEW v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965).

[51] 175 N.W.2d 110 (Iowa, 1970).

The plaintiff Board of Regents appealed a lower court ruling which held that the plaintiff possessed the requisite power to enter into negotiations and execute a collective bargaining agreement with representatives of the union. The defendant union appealed from the lower court's order prohibiting them from picketing on campus for the purpose of coercing the plaintiff into collective bargaining. Both orders were affirmed, but this discussion will be limited to that part of the court's decision relative to the power to engage in collective bargaining.

An initial problem faced by the court was the precise context in which public sector collective bargaining should be considered in the absence of statutory provision. A decision was made to view collective bargaining from the standpoint of the power and authority of the Board of Regents to "*confer* and *consult* with representatives of the employees in order to make its judgment as to wages and working conditions."[52] Basically, this is the same context in which public sector collective bargaining has been considered throughout this article.

The court met the traditional objection that collective bargaining with public employees results in an unauthorized delegation of legislative authority and found that the Board of Regents could meet with representatives of an employees' union to discuss wages, working conditions and grievances and this action would not involve an improper delegation of power. The determining factor was that the Regents were under no duty or compulsion to sign an agreement. The final decision was with the Board of Regents.

Having met the threshold question, the power of the Regents to enter into a contract with the union was affirmed with certain restrictions. As long as the terms of the contract stay within the statuory power of the Board of Regents, and the contract contains no terms of employment which could not be included in a standardized contract for individual employees, it will be binding on all members of the union agreeing to representation. The court did not say, but it is assumed, that the terms of the contract would also be binding on the Board of Regents. Another condition clearly stated by the court was that the Regents would not have the power under this ruling to enter into an agreement which would make the union the exclusive bargaining agent of the employees.

It should be emphasized that the court stated several times in the *Board of Regents* case that the Regents could voluntarily meet and confer with union representatives, but they were not obligated to do so, and the final decision on any matters of negotiation and agreement rested with the Regents. This is in accord with the generally held view that, although a governmental unit may have the power to negotiate and bargain collectively with its employees, it may not and should not be compelled to do so.[53]

While the Iowa Supreme Court did rule on the question of whether a power to engage in collective bargaining existed, it did so with ap-

[52] 175 N.W.2d at 112 (emphasis added).

[53] Dole, *supra* note 22, at 549.

parent reluctance and indicated that any further extension of collective bargaining rights would be a proper function of the legislature rather than the judiciary.[54] This may well be true, but it is a fact that many public employees are not waiting for enabling legislation to assert what they believe to be their right to bargain about wages and working conditions. Consequently, local governments are going to be forced to choose an appropriate course of action and, if they choose to negotiate and bargain with their employees, the courts will bear the initial burden of developing guidelines in the area of public sector collective bargaining.

VI. *Conclusion*

As the role of local governments expands and the demand for municipal services increases, the relationship between the public employer and the public employee will be a primary factor either contributing to the successful fulfillment of the obligation imposed on local governments or seriously impeding it. Mississippi has already felt the pressures of public employee activism,[55] and the probable conclusion is that this is only the beginning. The option to recognize and bargain with its employees should be available to the municipality which deems it to be in the best interest of its citizens.

Under the present laws of the State of Mississippi, the power to contract granted municipalities should be a vehicle for recognizing collective bargaining as a legal procedure. This will depend, of course, on the view the courts take of collective bargaining with public employees. Should the courts recognize the changes in attitude evidenced in other jurisdictions, the right of a municipality to bargain collectively may well be established. On the other hand, a failure to recognize the power of a municipality to bargain could lead to serious disruptions of municipal governments.

If the power to bargain collectively is recognized, it should be, in the absence of legislation, discretionary with the various municipalities rather than mandatory. By being discretionary, the public interest in having duly elected officials make the decisions entrusted to them by the electorate would be protected.

It has been said of Mississippi municipalities that they sometimes invent ways to meet their particular needs, and the devices used may or may not be sanctioned by statutory authority.[56] Public employee collective bargaining represents such a device and may well serve the needs of municipalities heretofore unaware of its availability. Collective bargaining employed in good faith presents an alternative to the disastrous consequences of an illegal strike by public employees.

Ralph E. Rood

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[54] 175 N.W.2d at 113-14.

[55] The recent strike by sanitation workers in Jackson, Miss., where collective bargaining was one of the issues involved. Litigation resulting from the strike and subsequent activism by the sanitation workers is still pending in the courts.

[56] D. Vaughn & R. Lijila, *Mississippi Municipalities: The Last Five Years*, 13 PUBLIC ADMINISTRATION SURVEY 4 (Bureau of Governmental Research, Univ. of Miss. Mar. 1966).

FEDERAL EMPLOYERS' LIABILITY ACT: APOSTASY OF SUFFICIENCY OF EVIDENCE POLICY

I. *Introduction*

At the turn of the century, railroad workers throughout the United States cried out for emendation of the grossly inadequate common law remedies available to recover for personal injuries and death occurring during the course of railroad employment. Congress failed to respond with a no-fault, workmen's compensation type scheme. Instead Congress enacted the Federal Employers' Liability Act,[1] which was essentially humanitarian and remedial. Unfortunately it retained, as a prerequisite to recovery, the necessity to plead and prove employer negligence in causing the injury or death. Generally, the decisions of the United States Supreme Court have reflected a liberal application of the Act; and, in order to insure that retention of the fault requirement would not be harshly applied by the courts, the Supreme Court reduced to the absolute minimum the quantum of proof necessary for a plaintiff-employee to reach the jury.

The Court has scrupulously protected this standard by granting certiorari in cases in which it appeared that the employee was wrongfully deprived of his right to a jury trial. The Court's review of a case solely on the question of sufficiency of evidence has been criticized by numerous sources; however, it would seem that the Court has viewed the right to a jury determination as essential to effectuate the purpose of the Act. In all but "infrequent cases,"[2] granting certiorari has been deemed necessary, not only to establish a uniform procedure which lower courts may apply in the majority of cases, but also to specifically set out the exceptions when a directed verdict, a judgment notwithstanding the verdict, or setting aside a jury verdict upon appeal would be proper.

The purpose of this comment is to acquaint the reader with the history and basic features of the Act, to trace the development of the Court's sufficiency of evidence policy, and to examine the Court's disposition of a recent Mississippi case which possibly indicates the erosion of that policy.

II. *Historical Development of the FELA*

From a background of inherently dangerous working environments[3] to which railroad employees were exposed at the turn of the century, Congress enacted the first Federal Employers' Liability Act,[4] commonly known as the FELA, in 1906. The first Act was ruled unconstitutional[5]

[1] 35 Stat. 65 (1908), *as amended*, 45 U.S.C. §§ 51-60 (1964).

[2] Rogers v. Missouri Pac. R.R., 352 U.S. 500, 510 (1957).

[3] For an excellent synopsis of the deplorable working conditions of railroads at the turn of the century and a statistical account of employee injuries and deaths *see generally* Lewis, *Federal Employers Liability Act*, 14 S.C.L.Q. 447 (1962) [hereinafter cited as Lewis].

[4] 34 Stat. 232 (1906).

[5] *The Employers' Liability Cases*, 207 U.S. 463 (1908).

in 1908 because it was not restricted to regulation of interstate commerce. A second Act[6] which remedied the constitutional objections was passed that same year. The 1908 Act is still in effect.

The Act provides for a damage suit by a railroad employee against his employer for occupational injuries caused by the negligence[7] of the latter and allows a survivors' action when the employer's negligence results in the employee's death.[8] The Act also abolishes the common law defense of the fellow servant rule,[9] and substitutes comparative negligence for contributory negligence.[10] Defenses available to an employer at common law were further emasculated in 1939 when the Act was amended to provide that an employee who institutes an FELA action "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ."[11]

The effect of the FELA was to preempt the field in interstate railroad employers' negligence cases to the exclusion of state common law and statutory remedies.[12] Although state workmen's compensation statutes proliferated in the early nineteen-hundreds, states could not extend coverage to interstate railroad workers who had been provided a remedy under the FELA.[13] The Mississippi Workmen's Compensation Act contemplates the exclusive federal remedy.[14]

Railroad employers within the meaning of the FELA are common

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[6] 35 Stat. 65 (1908), *as amended*, 45 U.S.C. §§ 51-60 (1964).

[7] Lewis, *supra* note 3. "The Federal Employers Liability Act is not a workmen's compensation act and in order for an employee who has been injured to recover under the act, he must prove that the carrier was, to some extent, negligent. A railroad employer is not an insurer of employees safety." *Id.* at 448.

[8] 35 Stat. 65 (1908) *as amended*, 45 U.S.C. § 51 (1964).

[9] Note, *The FELA—A Federal Remedy for Railroad Employees*, 1962 L. FORUM 243. "The statute provides that a cause of action from the negligence of officers, agents, or employees of the carrier. This section abolishes the fellow-servant doctrine and results in the negligence of a co-employee being imputed to the employer." *Id.* at 247.

[10] 32 AM. JUR. 2d, *Federal Employers' Liability And Compensation Acts* § 7 (1967). "An employee's right to recover under the Act is not affected by his own negligence . . . unless such negligence is shown to have constituted the sole cause of the alleged injury. But . . . where the injured employee is shown to have been contributorily negligent, the damages are to be diminished by the jury in proportion to the amount of negligence attributable to him." *Id.*

[11] 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1964). *See also* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

[12] South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953); Erie R.R. v. Winfield, 244 U.S. 170 (1917).

[13] Philadelphia & Reading Ry. v. Polk, 256 U.S. 332 (1921). *See also* Delisi, *Scope of the Federal Employers' Liability Act—Recent Developments*, 18 MISS. L.J. 206 (1947).

[14] *E.g.*, "This act shall not apply to transportation and maritime employments for which a rule of liability is provided by the laws of the United States." MISS. CODE ANN. § 6998-03 (Supp. 1966).

carriers by rail[15] engaged in interstate or foreign commerce.[16] A railroad may be deemed to be engaged in interstate commerce even though the physical location of its tracks does not extend outside of the state.[17] The general test is whether a carrier, as part of its usual business, moves goods which are going from one state to another.[18]

The benefits of the FELA of 1908 were limited to employees who were actually engaged in interstate or foreign commerce at the moment of injury or death;[19] however, the scope of coverage was expanded by the 1939 amendment to include:

> Any employee . . . part of whose duties . . . shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce. . . ."[20]

After the 1939 amendment, practically any railroad employee might be afforded the protection of the Act, regardless of whether the employee's duties exposed him to the special hazards of the railroad industry.[21] The test as enunciated in the 1939 amendment requires a case by case determination.[22] The question is normally one for the jury when the evidence is conflicting.[23]

There are other distinctive features of an FELA action. Suits arising under the FELA and other acts of Congress regulating commerce may be brought without regard to jurisdictional amount;[24] federal and state courts have concurrent jurisdiction and an action is not removable by the defendant if commenced in state court;[25] if an action is commenced in state court, the court must apply federal substantive law, although it is free to follow the state's rules of procedure.[26] Despite the difficulty of formulating precise rules distinguishing substance and procedure, it is firmly established that a state may not circumvent a liti-

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[15] 35 Stat. 65 (1908), *as amended*, 45 U.S.C. § 51 (1964). For judicial interpretation of these provisions, *see generally* Washington v. Kuykendall, 275 U.S. 207 (1927); Ciaccio v. New Orleans Public Belt R.R., 285 F. Supp. 373 (E.D. La. 1968).

[16] 35 Stat. 65 (1908), *as amended*, 45 U.S.C. § 51 (1964).

[17] 4 PERSONAL INJURIES 9 (1967).

[18] *Id.*

[19] Shanks v. Delaware, Lackawanna & W.R.R., 239 U.S. 566 (1916).

[20] 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1964).

[21] Reed v. Pennsylvania R.R., 351 U.S. 502 (1956). "The statute commands us to examine the purpose and effect of the employee's function in the railroad's interstate operation, without limitation to nonclerical employees or determination on the basis of the employee's importance as an individual in the railroad's organization." *Id.* at 506.

[22] *Id.* at 507.

[23] 32 AM. JUR. 2d *Federal Employers' Liability and Compensation Acts* § 17 (1967).

[24] C. WRIGHT, LAW OF FEDERAL COURTS 109 (2d ed. 1970).

[25] 4 PERSONAL INJURIES 95 (1967).

[26] 11 AM. JUR. *Trials, FELA Litigation* § 6 (1966). "In determining the applicable federal law a state court is bound by the language of the Act itself, together with decisions of the United States Supreme Court construing the Act." *Id.*

gant's right to trial by jury, nor any other federally created right, solely in the name of procedure.[27]

III. *The Supreme Court's FELA Policy*

As previously noted, after the 1939 amendment, all of the traditional common law defenses in employer negligence cases had been abrogated by Congress. The Supreme Court found little difficulty, therefore, in formulating a policy line to effectuate a liberal recovery, short of requiring the employer to be an absolute insurer. In *Tiller v. Atlantic Coast Line R.R.*,[28] the Court established its policy concerning the lingering defense of assumption of risk. The Court said:

> [E]very vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment. . . .[29]
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> . . . .
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> No case is to be withheld from a jury on any theory of assumption of risk. . . .[30]

Mr. Justice Frankfurther concurred with the majority's policy in the *Tiller* case, but thought that Congress should have adopted a system of no-fault workmen's compensation for the railroad industry rather than the FELA.[31] Numerous other authorities have suggested similar proposals.[32] There are a multitude of reasons why the FELA should be replaced by a compensation scheme to be administered by a federal agency; *e.g.*, the expanding workload of the court, the excessive cost and delays of litigation which substantially tarnish even favorable jury verdicts, and the ever rising cost of insurance which railroads must bear. Further discussion of the merits of a no-fault and limited liability compensation system is beyond the scope of this comment; rather, the question is, has the Supreme Court's policy line been as equitable as possible to railroad employees without unreasonably penalizing the railroads? Further, does the policy formulated by the Supreme Court insure that the plaintiff-employee will encounter uniform procedure whether he brings the action in federal district court or in a state court of competent jurisdiction?

Assuming that the answer to these questions *should* be in the affirmative, if application of the FELA is to be consistent with con-

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[27] Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549, 554-55 (1961).

[28] 318 U.S. 54 (1943).

[29] *Id.* at 58.

[30] *Id.* at 67.

[31] *Id.* at 71 (concurring opinion).

[32] *See, e.g.*, Miller, *Workmen's Compensation For Railroad Employees*, 2 LOYOLA L. REV. 138 (1944); Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROB. 188 (1953); Parker, *FELA or Uniform Compensation for All Workers*, 18 LAW & CONTEMP. PROB. 208 (1953); Pollack, *The Crisis in Work Injury Compensation On and Off the Railroads*, 18 LAW & CONTEMP. PROB. 296 (1953); Comment, *The Federal Employers' Liability Act—A Plea for Reform*, 14 ST. LOUIS L.J. 112 (1969).

gressional intent and if the FELA is to serve as a viable substitute for another type of workmen's compensation scheme, these questions will be directed toward a single, yet potent and polemic, segment of the Supreme Court's FELA policy—the sufficiency of evidence needed for issues to reach the jury.

IV. *Sufficiency of Evidence Requirement in FELA Cases*

If there is a landmark case in the history of the FELA, it is *Rogers v. Missouri Pacific R.R.*,[33] in which the Supreme Court granted certiorari on the question of whether the Supreme Court of Missouri had invaded the jury's function by reversing a state circuit court's award for damages "upon the ground that the petitioner's evidence did not support the findings of the respondent's liability."[34] In *Rogers*, the Court declared a jury trial an essential element of the relief afforded by Congress under the FELA. Mr. Justice Brennan, who delivered the opinion of the Court, stated the standard of causation necessary in FELA cases and the test for the court to determine a jury question:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion *may* be drawn that negligence of the employer played *any part at all* in the injury or death.[35] (emphasis added.)

Mr. Justice Brennan observed that the 1939 amendment had extended the coverage of the Act and eliminated assumption of risk as a defense. The courts, therefore, no longer possessed the broad power to restrain the fact finding function of the jury and deny relief as a matter of law.[36] Mr. Justice Brennan alluded to the congressional intent regarding the function of the jury in FELA cases and emphasized that the Court had scrupulously reviewed and would continue to scrupulously review by certiorari the judgments of lower federal and state courts to ensure a uniform application of such intent:

> Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that

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[33] 352 U.S. 500 (1957).

[34] *Id.*

[35] *Id.* at 506-07.

[36] *Id.* at 509.

> Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction.[37]

> The decisions of this court after the 1939 amendment teach that the Congress vested the power of decision in these actions *exclusively* in the jury in all but . . . infrequent cases. . . .[38] (emphasis added.)

In the years following the 1939 amendment the Supreme Court granted certiorari for an astonishing percentage of FELA petitions to review the question of the worker's right to get his case to the jury.[39] From 1945 until *Rogers* was decided in 1957, "the Supreme Court . . . handed down an almost unbroken line of decisions holding that the plaintiff's case must go to the jury."[40] This "decade of progress"[41] reached its zenith with *Rogers*. The Court's FELA philosophy evolved from one of *fault liability*, which clearly had been professed prior to 1935, to one of *loss distribution*[42] to be applied to the railroad industry.

This is not to imply that the Court has judicially wrought a metamorphosis of the Act to the point of allowing no-fault recovery. The Court has never eliminated negligence as a prerequisite to recovery, but in *Rogers* the Court reduced the quantum of proof of negligence and causation required to reach the jury in FELA cases to the absolute minimum. This test has been characterized as no different from the "scintilla" rule, although the Court has never expressly adopted that rule.[43]

Mr. Justice Harlan recognized that the majority in *Rogers* had adopted the "scintilla" rule and disagreed with its applicability:

> No scientific or precise yardstick can be devised to test the sufficiency of evidence in a negligence case. . . . It has, however, been common ground that a verdict must be based on evidence —not on a scintilla of evidence but evidence sufficient to enable a *reasoning* man to infer both negligence and causation by *reasoning from the evidence*. . . . [I]t has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor

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[37] *Id.*

[38] *Id.* at 510.

[39] Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441, 1445 (1956).

[40] *Id.* at 1447.

[41] *See* Hare, *Actions for Personal Injuries and Death of Railroad Workers*, 17 ALA. L. REV. 201, 209 (1965).

[42] Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549, 553 (1961).

[43] *Id.* at 559.

> the Federal Employers' Liability Act lifted that duty from the courts.[44]

Despite criticism of *Rogers* by dissenting members of the Court, the decision has been conscientiously followed by lower federal courts and states since it was decided in 1957. One need only peruse recent FELA decisions to find cases in which the sufficiency of evidence rule in *Rogers* is controlling.[45] In the recent case styled *Missouri-Kansas-Texas Ry. v. Hearson*,[46] the United States Court of Appeals, Tenth Circuit, cited the *Rogers* rule and declared that, upon a motion for a directed verdict by the defendant, the role of the trial judge is to determine if the plaintiff had shown proof of at least "slight" negligence. If this test is met, it is a proper issue for the jury.[47] The role of the appellate court naturally follows:

> [W]hen an appellate court is asked to overturn the jury's verdict in a FELA case, we need only look to see if the evidence is completely devoid of probative facts which support the conclusion reached.[48]

It is not suggested here that anything in the FELA or the *Rogers* decision precludes direction of a verdict in the proper case. Where, for example, there was no proof explaining how or why the decedent employee's body was found near the tracks, a directed verdict was proper;[49] where the employee merely showed that he was injured when bands securing pipes on a gondola car snapped, absent evidence of employer negligence, a directed verdict was proper;[50] where proof indicated that the sole cause of the accident was the negligence of the employee, a directed verdict was proper.[51] The conclusion remains, however, that since 1957 the Supreme Court has generally continued to apply the concepts of *Rogers*, grant certiorari, and reverse directed verdicts except in "infrequent cases."[52]

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[44] Rogers v. Missouri Pac. R.R., 352 U.S. 500, 563-64 (1957) (dissenting opinion). *See also* separate dissent by Mr. Justice Frankfurter. *Id.* at 524.

[45] *See, e.g.*, Missouri-Kan.-Tex. Ry. v. Hearson, 422 F.2d 1037 (10th Cir. 1970); Ross v. Chesapeake & O. Ry., 421 F.2d 328 (6th Cir. 1970); Fuhrman v. Reading Co., 311 F. Supp. 782 (E.D. Pa. 1970); Central of Ga. R.R. v. Rush, 239 So. 2d 763 (Ala. 1970); Kentucky & I.T.R.R. v. Martin, 437 S.W.2d 944 (Ky. 1969); Jones v. New York Cent. R.R., 155 N.W.2d 216 (Mich. 1967).

[46] 422 F.2d 1037 (10th Cir. 1970).

[47] *Id.* at 1040.

[48] *Id.*

[49] Baum v. Baltimore & O. R.R., 256 F.2d 753 (7th Cir. 1958), *cert. denied*, 358 U.S. 881 (1958).

[50] Albergo v. Reading Co., 372 F.2d 83 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967).

[51] Spinello v. New York, Chi. & St. L. Ry., 173 Ohio St. 324, 181 N.E.2d 884 (1962).

[52] *See, e.g.*, Baltimore & O.R.R. v. Davis, 235 Md. 568, 202 A.2d 348, *rev'd*, 379 U.S. 671 (1965); Dennis v. Denver & Rio Grande W. R.R., 13 Utah 249, 372 P.2d 3, *rev'd*, 375 U.S. 208 (1963); Basham v. Pennsylvania R.R., 11 N.Y.2d 991, 183 N.E.2d 704, *rev'd*, 372 U.S. 699 (1963); Harrison v. Missouri Pac. R.R., 35 Ill. App. 2d 66, 181 N.E.2d 737, *rev'd*, 372 U.S. 248 (1963); Gallick v. Baltimore & O.R.R., 172 Ohio St.

V. *Recent Developments of the Sufficiency of Evidence Rule*

A. *Certiorari and FELA Cases*

Prior to *Rogers* there was intense criticism from sources outside the Court that the FELA was an inadequate and ineffective system for the relief of injured railroad workers because negligence had not been eliminated as a basis for recovery.[53] Since the *Rogers* decision there has been even more vehement criticism from those who express the fear that the Supreme Court has gone too far to the opposite extreme by using certiorari to transform the FELA to a statute of absolute liability regardless of fault.[54] This criticism seems unjustified.

Notwithstanding some members of the Court having traditionally considered a denial of a jury verdict in FELA cases, a denial of the guarantee of the seventh amendment,[55] the Court has viewed jury verdicts as essential to effectuate the purpose of the FELA.[56] It does not seem unreasonable, therefore, that the Court has been compelled to grant certiorari to a disproportionate number of cases on the sole issue of the sufficiency of evidence in order to clearly establish its philosophy in this respect. In recent years the lower courts have recognized that a plaintiff-employee should not be deprived of a jury determination except in "infrequent cases"[57] as expressed in *Rogers*. Accordingly, there have been fewer petitions for certiorari filed on this issue. When such petitions are filed, however, the Court should be quick to grant certiorari unless the case falls within the permissible exceptions recognized by the Court. To do less would be to hopelessly confuse both the lower courts and the litigants in an area where at least some degree of uniformity has been established.

It appears that the United States Supreme Court did do less, however, when it refused to review *Rodicker v. Illinois Central R.R.*,[58] in which the Supreme Court of Mississippi upheld a circuit court's directed verdict for the defendant-railroad. The case was brought by petitioner against the Illinois Central Railroad Company in the Circuit Court of Scott County. After all the evidence had been presented by both parties, the court granted the defendant's motion and dismissed the suit. The circuit court held that, as a matter of law, the plaintiff was not

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488, 178 N.E.2d 597, *rev'd*, 372 U.S. 108 (1963), New York, N.H. & H.R.R. v. Henagan, 272 F.2d 153 (1st Cir. 1959), *rev'd*, 364 U.S. 441 (1960); Conner v. Butler, 109 So. 2d 183 (Fla. 1959), *rev'd*, 361 U.S. 29 (1959); Harris v. Pennsylvania R.R., 168 Ohio St. 582, 156 N.E.2d 822, *rev'd*, 361 U.S. 15 (1959).

[53] *See* note 32 *supra*.

[54] *See* Corso, *How FELA Became Liability Without Fault*, 15 CLEV.—MAR. L. REV. 344 (1966); Hart, *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Griswold, *Forward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

[55] Comment, *supra* note 42, at 550, 553, 554.

[56] Cases cited note 54 *supra*.

[57] Rogers v. Missouri Pac. R.R., 352 U.S. 500, 510 (1957).

[58] 236 So. 2d 414 (Miss 1970), *cert. denied*, 39 U.S.L.W. 3310 (U.S. Jan. 18, 1971).

an employee of the Illinois Central at the time of the accident but was a loaned servant under the exclusive direction and control of the New Orleans Union Passenger Terminal.

The denial of certiorari brought strong dissent from Mr. Justice Black with whom Mr. Justice Brennan and Mr. Justice Douglas joined.[59] The dissent indicated that the case was one in which the principles of *Rogers* should have been applied. The dissent leads one to conclude that the Court retreated from its traditional liberal application of the FELA. The words of Mr. Justice Black express the same principles that were emphasized in *Rogers*:

> On this record petitioner was entitled to have a jury determine whether he should recover from Illinois Central.[60]
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> Today the Court deprives petitioner of his right to a jury trial and frustrates the plan of Congress to provide a remedy for railroad employees injured by their employers' negligence.
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> I think it is of paramount importance that the purpose of Congress to protect people like petitioner should not be frustrated by the will of judges. I would grant certiorari. . . .[61]

The dissent in *Rodicker* indicates that, although *Rogers* dealt specifically with establishing the measure of evidence needed to reach the jury on the issues of causation and employer negligence, the *Rogers* decision actually established the broader principle that a jury determination of all issues, including employment status, is essential to effectuate the purpose of the Act.

It is submitted by this writer that, even if *Rogers* itself cannot be interpreted as so broad in scope, subsequent decisions of the Court have extended the reasoning in *Rogers* on the issues of causation and negligence to the issue of whether a plaintiff is an employee of a defendant railroad within the meaning of the Act.

B. *Rodicker v. Illinois Central R.R.*[62]

One of the four basic elements of a cause of action arising under the FELA is the requirement that the plaintiff be an employee of the defendant-railroad at the time of his injury.[63] A general employee of another may be able to prove that he was a loaned servant to the defendant-railroad at the time of the injury and, as such, was a *special employee* to the benefits of the FELA.[64] Likewise, as in the *Rodicker* case, the railroad may defend on the premise that the plaintiff was not its employee, within the common law rule of master and servant, at the time of injury, but a loaned servant to another for whose negligence

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] 236 So. 2d 414 (Miss. 1970), *cert. denied*, 39 U.S.L.W. 3310 (U.S. Jan. 18, 1971).

[63] 4 PERSONAL INJURIES 101 (1967).

[64] *Id.* at 14.

the defendant-railroad cannot be held liable.[65] The issue of employment relationship is normally one for the jury.

In *Baker v. Texas & Pacific Ry.*,[66] decided only two years after *Rogers*, the United States Supreme Court granted certiorari and reversed the federal district court's ruling as a matter of law that the decedent railroad worker was not an employee of the defendant-railroad at the time of his death and not entitled to the benefits of the Act. The Court concluded that the issue of employment relationship, like the question of causation and negligence discussed in *Rogers*, is a factual question for the jury to be determined from all the features of the relationship.[67]

> Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault and causation under the Act, contains factual elements such as to make it one for the jury. . . .[68]

Baker v. Texas & Pacific Ry.[69] clearly sets the standard which the lower courts should follow on the issue of employment status; yet, this standard was disregarded in *Rodicker*. It is submitted that *Rodicker* was not so wholly devoid of probative facts in support of the petitioner's contentions to justify a directed verdict against him. The refusal of certiorari cannot be justified unless, of course, the United States Supreme Court no longer considers a jury determination essential on the issues of causation, negligence, and employment status.

In *Rodicker*, the petitioner was employed by Illinois Central Railroad Company in 1959 and continued to work for the company until the day of injury in 1964. Illinois Central and five other railroad companies serving the City of New Orleans had entered into a contract with the New Orleans Union Passenger Terminal, also a railroad company, whereby Union Passenger Terminal would be responsible for switching passenger trains in their terminal yard for the benefit of the six other railroads. Each of the six companies serving the terminal supplied a quota of men to Union Passenger Terminal as switching crews in the yard. These jobs were preferred work bid for by employees of the six companies on the basis of seniority. The jobs were rotated after a number of days. The petitioner was a switchman and, as such, worked in various yards owned by Illinois Central and occasionally worked at the Union Passenger Terminal. The petitioner was working in the terminal yard under this arrangement on the night of his injury. The injury occurred when the petitioner, after switching an Illinois Central car, was riding on a Union Passenger Terminal switch engine. The engine suddenly spewed a shower of sparks over petitioner's body. As he retreated down the steps of the engine, his head and shoulder struck a steel garbage container adjacent to the tracks. The petitioner

[65] *Id.* at 15.

[66] 359 U.S. 227 (1959); *see also* Ward v. Atlantic Coast Line R.R., 362 U.S. 396 (1960).

[67] 359 U.S. at 228.

[68] *Id.*

[69] 359 U.S. 227 (1959).

was knocked onto the tracks and sustained a permanent, totally disabling injury.

The petitioner brought suit against Illinois Central and alleged that it was negligent in permitting the use of an engine which emitted excessive sparks and in permitting a garbage container to be placed dangerously close to the tracks. The petitioner contended that, notwithstanding the arrangement with Union Passenger, Illinois Central was his employer and under an absolute, continuing and non-delegable duty to provide a safe place to work. The trial court concluded, however, that the petitioner was not an employee of Illinois Central. The Supreme Court of Mississippi agreed, stating:

> [T]he question as to who was the master of the injured servant at the time of his injury depended upon the facts in each case with respect to who had the supervision, direction and control of the details of the work being done by the servant at the time. There is nothing in the record to indicate that Illinois Central exercised, or attempted to exercise any supervision or control of this work, or retained any right to supervise, direct or control it.

However, Mr. Justice Black in dissent of denial of certiorari found that the evidence was not so one-sided:

> [Petitioner] had an Illinois Central employee number and was being paid by check drawn on the Illinois Central. He regularly applied to the Illinois Central for vacation time and received vacation pay from it. And of course he was actually coupling an Illinois Central car at the time of the injury.[71]

Mr. Justice Black cited the case of *Terminal Railroad Association of St. Louis v. Fitzjohn*,[72] in which the facts regarding the employer-employee relationship were almost identical to those in *Rodicker*. In *Fitzjohn* the United States Court of Appeals, 8th Circuit, held that an arrangement between two railroad companies, similar to the one between Illinois Central and Union Passenger Terminal in *Rodicker*, "contemplated no change in the employment status of the plaintiff or of other members of the switching crew and no deprivation of any of their rights or benefits as employees of the defendant."[73] Although decisions of the United States Courts of Appeal are not mandatory authority, the *Fitzjohn* decision should have been highly persuasive since its facts are strikingly similar to those in *Rodicker*.

VI. *Conclusion*

In light of the *Fitzjohn* decision, which has never been overruled, and the philosophy of the United States Supreme Court concerning an

[70] Rodicker v. Illinois Cen. R.R., 236 So. 2d 414, 420 (Miss. 1970).

[71] Rodicker v. Illinois Cen. R.R., 39 U.S.L.W. 3310 (U.S. Jan. 18, 1971). *See also* other issues of fact concerning the employment status, Brief for appellent at 21, Rodicker v. Illinois Cen. R.R., 236 So. 2d 414 (Miss. 1970).

[72] 165 F.2d 473 (8th Cir. 1948).

[73] *Id.* at 476.

employee's right to a jury determination of the issue as expressed in *Rogers v. Missouri Pacific R.R.*,[74] and the expansion of that philosophy as expressed in *Baker v. Texas & Pacific Ry.*,[75] the denial of certiorari in *Rodicker* may indicate a shift toward a more conservative application of the FELA. If this be so, it is submitted that the results will be exceedingly unfortunate for interstate railroad workers who are killed or injured by employer negligence. Although the FELA was first adopted fifty-five years ago, the Act did not become an adequate substitute for a workmen's compensation type scheme until the *Rogers* decision in 1957. If the United States Supreme Court refuses certiorari to review the sufficiency of evidence, even in close cases, when the lower court has withheld the issues from the jury, the Court subverts uniform application of the Act and defeats the very purpose for which it was enacted.

Ray Mitchell

AUTOMATIC RENUNCIATION: BENEFIT OR DETRIMENT?

I. *Introduction*

In *Bullock v. Harper*[1] the Mississippi Supreme Court applied a section of the Mississippi Code which has long been overlooked by attorneys and scholars alike. The claimant in the case was the spouse of Bettie Bullock, deceased, who by her will had devised her entire estate to her nephew and his wife. Although the estate had been closed, the court held that the will had been renounced by operation of law under Mississippi Code 1942 Annotated § 669 (1956).[2] Unfortunately, the court thought it unnecessary to expound upon the total effect or operation of such a renunciation by law. It is to this end that the remaining portion of this paper is addressed.

II. *The Meaning of "Provision"*

Section 669 provides that the will of a deceased which contains *no provision* for the surviving spouse shall be renounced by law as though the will had contained a provision that was unsatisfactory and the surviving spouse had renounced it. In interpreting this section, the court has found such a will to be renounced "by operation of law,"[3] and that the causative wording is "no provision." Thus, the question of what is meant by "provision" within the context of the statute arises. In the very old case of *Carter v. Harvey*,[4] the Court addressed itself to this question. The facts of the case show that the testatrix had devised all of her prop-

[74] 352 U.S. 500 (1957).

[75] 359 U.S. 227 (1959).

[1] 239 So. 2d 925 (Miss. 1970).

[2] MISS. CODE ANN. § 669 (1956) first appeared in Mississippi law in the Rev. Code of 1880 as § 1173 and has been included in each subsequent Code. For early notation by the Mississippi Supreme Court *see* Gordon v. James, 86 Miss. 719, 39 So. 18 (1905); and Kelly v. Alred, 65 Miss. 495, 4 So. 551 (1888).

[3] Bullock v. Harper, 239 So. 2d 925, 927 (Miss. 1970).

[4] 77 Miss. 1, 25 So. 862 (1899).

erty to her three children and had made her husband executor of the estate and guardian of the children.[5] The husband was to have complete control of the estate until the children came of age, and the will further provided that if the children should die before the husband, then he should inherit all the property.[6] The court found that provision had been made for the husband[7] and that if it was inadequate, the husband's only remedy was to renounce under the code section providing for renunciation in the event of an unsatisfactory provision in the will.[8] In finding that provision had been made for the husband, the court stated:

> He was made executor of the will and guardian of the infant children (then of very tender age), without bond, with the right to use the estates, as he always had done, for the benefit of the infants. He thus had some provision made for him.[9]

As a means of strengthening its decision, the court stated that the whole estate had been bequeathed and devised to the husband absolutely in the event that the children died before reaching majority,[10] but this was not the stated basis of the decision.

From the basis of the decision, it would appear that the word "provision" as used in section 669 does not mean a gift of a tangible benefit to the surviving spouse, but rather the granting of any right, privilege, or relationship which the surviving spouse would not necessarily enjoy or experience as a legal right without the grant of the will. Thus, the grant of an administrative duty as in the *Carter*[11] case should suffice.

The argument against this interpretation is that the broad meaning given to the word is a destruction of the legislative intent. One spouse should not leave the other spouse unprovided for if provision is possible. It is submitted that such a broad meaning of the word is the better view when the complications[12] which could arise under a narrower holding are considered. In addition, the surviving spouse always has the election to renounce the will within six months after the will is admitted to probate, if the provision is deemed to be inadequate. In *Simpson v. Simpson*,[13] the court held that " 'satisfactory provision' is not to be determined by any court, but is to be determined solely by the [surviving spouse]. And when the widow or the husband signifies dissent to the will of the other, either one may renounce it in the manner provided by statute."[14]

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[5] *Id.*

[6] For the husband's interest to vest, the children had to die before reaching the age of majority.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 6, 25 So. at 863.

[10] *Id.*

[11] 77 Miss. 1, 25 So. 862 (1899).

[12] *See* Sections III and IV of this note.

[13] 120 Miss. 197, 82 So. 3 (1919).

[14] *Id.* at 200, 82 So. at 3.

III. *Special Problems*

The *Bullock*[15] case allowed a renunciation of the testatrix's will by operation of law under section 669 after the estate had been closed. Although the court in its opinion does not indicate the time in which a suit must be brought to acquire the rights granted by section 669, it is this question which commands attention. The Mississippi Code 1942 Annotated, § 505 (1956) provides that any person interested may, at any time within two years, contest the validity of the will probated without notice. It further provides that if any such interested person does not appear within two years to contest the will, the probate shall be final and forever binding save to special classes of persons under disabilities therein set forth. At first glance one would take this as a two-year statute of limitations upon claiming the rights granted under section 669, but in the case of *Edwards v. Edwards*,[16] the court distinguished between renouncing a will and contesting the validity of a will. The court stated:

> Renouncement does not affect the validity of the will; it affects only the amount of property which the parties receive—the renouncer as heir of decedent and the others as beneficiaries under the will. The will stands. But a successful contest establishes that there is no will. Therefore, renouncement cannot be substituted for a contest of a will. Section [669, Code 1942], a companion section to [668], provides that when the will of the husband or wife makes no provision whatever for the other, the law renounces it for the survivor, who thereupon has the right to share in the estate of the decedent as in case of unsatisfactory provision, followed by renouncement by the survivor. So that, if renouncement works estoppel to contest the will, we would have the anomaly of the law itself making the election under Section [669] and thereby cutting off the right of contest.[17]

Apparently, there is no section of the code specifically drafted to cover this situation. It is submitted that the court will have to rely upon Mississippi Code 1942 Annotated (1956) § 722, which provides a six-year statute of limitations for all actions for which no other period of limitations is prescribed. By analogy, the period of limitation should begin to run after the probate of the will,[18] the same as has been established for the six-month period of limitation allowed for an unsatisfactory provision.[19]

It is possible that the courts could use Mississippi Code of 1942 Annotated § 709 (1956) for devises of real property and thus, have a ten-year statute of limitations for realty, but it is submitted that this

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[15] 239 So. 2d 925 (Miss. 1970).

[16] 193 Miss. 889, 11 So. 2d 450 (1943).

[17] *Id.* at 894, 11 So. 2d at 451-52.

[18] Simpson v. Simpson, 120 Miss. 197 at 199, 82 So. 3 (1919). However, since there are no statutory provisions in section 669, the running of the time could begin when the will is admitted to probate without causing any precedent conflict.

[19] Miss. Code Ann. § 668 (1956).

would be unwise. In the situation of automatic renunciation, personalty and realty should be subject to the same statute of limitations, society's need for finality and efficient utilization of its resources providing the basis for the decision.

Regardless of the time limitation applied by the court, any attorney who finds himself probating a will which makes no provision for the surviving spouse should probate the will in solemn form as provided by section 503 of the Mississippi Code. This section allows all interested persons to be made parties to the probate preceedings and further provides that "all who are made parties thereby shall be concluded by the probate of the will."[20] This section does not speak of the validity of the will, but rather of conclusiveness of the probate. Although no definite authority can be found to substantiate this position, the courts could find that a surviving spouse so made a party to the probate is estopped from claiming the benefits of section 669 after the estate has been closed —either by a statutory barring (section 503) or by implied waiver as the spouse failed to speak at the proper time. The need for finality of actions and the need for efficient development of our resources are strong policy considerations in favor of such a position. Of course, the best way to handle such a situation is to require the surviving spouse to be made a party to the probate and then to issue a written waiver of the benefits of section 669 if the surviving spouse wishes to carry out the intentions of the testator or testatrix as indicated by his or her will.

If a will having no provision for the surviving spouse is probated in common form (without making all interested persons parties to the probate), and the surviving spouse later wishes to claim the benefits of section 669, an interesting question arises. In what manner are those who took the property at the closing of the estate holding? A diligent search has yielded no case wherein our court has answered this question; but as the court pointed out in the *Bullock*[21] case, the renunciation under section 669 occurs by operation of law, and the surviving spouse need not formally renounce the will of the decedent. Therefore, if such a will is probated in common form, those who take possession of the property or money of the devise, bequest or legacy are entitled to either one-half of the devise, bequest or legacy or all but a child's share thereof, depending upon the specific application of section 670[22] of the code; they will not have the right to the entire property or to the full enjoyment of the entire property. It is submitted that persons who take the property at the closing of the estate hold the portion which by operation of sections 669 and 670 are the rightful property of the surviving spouse in a constructive trust. Such a constructive trust has as its basis the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily it arises without regard to the intention of the person who transferred the property.[23]

[20] MISS. CODE ANN. § 503 (1956).

[21] 239 So. 2d 925 (Miss. 1970).

[22] MISS. CODE ANN. (1956) which provides a formula for determining the share to which a surviving spouse is entitled once renunciation has occurred under either section 668 or section 669. See V. of this note.

[23] A constructive trust was chosen over a resulting trust as the latter normally "arises in favor of the person who transferred the property or caused it to be trans-

There is no authority for this position, but it does conform to the general principles of law as they now exist.[24]

As long as title to the property is vested in the original person taking under the will, the application of the doctrine of constructive trusts can easily be applied to enforce the rights of the surviving spouse. But after the original devisee transfers the title to the property to an innocent purchaser for value (or the legatee no longer has his gift), the convenience of the rule is questioned by the harshness of the doctrine when applied against the innocent purchaser. In addition to the harshness of the doctrine when applied in such a situation, such law discourages transfer of property to those who would efficiently develop and use the property for society's benefit.

To avoid such a harsh rule, the court could allow the surviving spouse to be subrogated to the position of the obligee if the property or money has been used to discharge a debt of the original taker under the will; it could impose an equitable lien against the property or money which the original taker received in exchange; or the court could make an unusual application of the doctrine of estoppel and hold that the spouse was estopped from claiming his rights under section 669.

IV. *Rights of Creditors*

In the early case of *Carter v. Harvey*,[25] the court found that the right of renunciation under what is now Mississippi Code 1942 Annotated § 668 (1956) was personal to the surviving spouse and could not be exercised by the creditors of the surviving spouse. In that case the creditors of the surviving spouse were trying to claim under what would now be section 669; but as has been mentioned earlier, the court applied a broad meaning to the term "provision" within the context of the statute in order to avoid deciding the precise question presented. In *Laughlin v. O'Reily*,[26] the court held that a surviving spouse, upon renunciation, becomes a tenant in common with beneficiaries under the will.[27] Whether the renunciation is made by formal act of the surviving spouse or by operation of law should have no bearing upon the effect of the renunciation, and it is submitted that for the court to impose a constructive trust upon that portion of the property gifted by the will and held by the original devisees or legatees for the benefit of the surviving spouse under section 669, the effect of the renunciation by operation of law must be the same as for renunciation by formal act under section 668. If this be the case, there follows no justifiable reason why

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ferred under circumstances raising an inference that he intended to transfer to the other a bare legal title and not to give him the beneficial interest." A. SCOTT, THE LAW OF TRUSTS § 404.2 (1967). The decedent intended by his will to give the beneficial interest to the grantee under the will, and a trust in the property arises only by operation of law.

[24] *See generally* A. SCOTT, THE LAW OF TRUSTS (1967).

[25] 77 Miss. 1, 25 So. 862 (1899).

[26] 92 Miss. 121, 45 So. 193 (1908).

[27] *Id.* at 125, 45 So. at 194; *see also* Davis v. Miller, 202 Miss. 880, 888, 32 So. 2d 871, 873 (1947).

the creditors of the surviving spouse could not attach that portion of the property which should pass to the surviving spouse under section 669. However, once again many difficulties could arise once the property has passed from the original takers to innocent purchasers.

V. *Meaning of "Separate Property"*

It has long been held that sections 668 and 669 must be read in conjunction with section 670, which provides a limit on the property which the surviving spouse may take by either a section 668 or a section 669 renunciation. This reduction is the value of his or her separate property held at the time of the testator's or testatrix's death, provided the separate property exceeds one-fifth of the share which the surviving spouse could take under sections 668 or 669 standing alone. While it is generally held today that property passing under a will substitute such as joint bank accounts constitutes separate property for purposes of section 670,[28] no such holding exists for property which passes to the surviving spouse as an heir at law. In *Cain v. Barnwell*,[29] the husband of the deceased was the sole heir at law of property not devised under the will. The husband, claiming the benefits of a renunciation of the will of his deceased spouse, claimed his one-half interest in the property devised by the will. The brothers and sisters of the deceased, devisees under the will, claimed that since the husband had elected to take one-half of the devised property, he was not entitled to take over one-half of all property, that devised and that not devised (the husband's share as the sole heir at law being more than one-half of the total estate).[30] The court, rejecting this argument, stated:

> Under this section the appellee was entitled to one-half of the devised property. But this section in no wise limits or circumscribes his right as sole heir at law to inherit the remainder of the property under the laws of decent and distribution, but limits his right only to one-half of the property devised or bequeathed in the will.[31]

If the court continues these distinctions in the future, it may be put in the position of having to count property passing under a will substitute as separate property within the meaning of section 670, but allowing property passing through the laws of descent and distribution to be outside the context of section 670. Such rulings ignore not only the intention of the deceased but also the intent of the legislature. The deceased has provided for his surviving spouse and any issue which he may have by the laws of decent and distribution. If this amount is inadequate, the surviving spouse may renounce and take additional property up to the statutory limits of one-half or a child's share less the

[28] Carter v. Evans, 230 Miss. 803 at 808, 94 So. 2d 237 at 238 (1957); *see also* Edwards v. Jeffcoat, 230 Miss. 56, 92 So. 2d 342 (1957); Shearin v. Coleman, 201 Miss. 193, 23 So. 2d 841 (1947).

[29] 125 Miss. 123, 84 So. 481 (1921), Cain v. Barnwell, 124 Miss. 860, 87 So. 484 (1921).

[30] 124 Miss. 860, 87 So. 484 (1921).

[31] *Id.* at 870, 87 So. at 485.

amount received by the laws of descent and distribution. One of the policy factors behind the legislative action in enacting section 668 and 670 was to discourage the improper disinheriting of a spouse, thus placing the burden of support of the spouse upon other relatives or upon the state. But by enacting section 670, the legislature intended to prevent the total destruction of the intention of the deceased in the disposition of his property and to limit the amount which a spouse could take against the wishes of the deceased spouse. If the ruling of the above cited *Cain* case is adhered to, then it would be to the advantage of every surviving spouse who is to take by the laws of descent and distribution to renounce the will or to claim the benefits of the section 669 automatic renunciation. Either way he or she would receive the full amount intended by the deceased and up to one-half of all of the devises and bequests of the will, provided the surviving spouse had no other property which would constitute enough separate property to act as a bar to any further taking.

VI. *Conclusion*

In the absence of legislative amendment which would provide section 669 with a statute of limitations which is not to exceed the probate proceeding, the court must continue to apply section 669 in the same manner as has previously been done. In speaking of renunciation by operation of law, the court stated in *Bullock*, "[t]he statute lends itself to no other interpretation."[32]

But as various situations arise which require the court's guidance, the needs of a surviving spouse will have to be balanced against society's interest as it appears in each situation. The requirement of certainty in the law necessitates thoughtful decisions providing the greatest good for the largest number of citizens. Before property passes from those gifted under the will to good faith purchasers, the needs of the surviving spouse appear to outweigh any of the elements of society's interest; once the property passes to a good faith purchaser, the opposite situation appears to exist.

The total number of times property passes by a section 669 renunciation may be small and the valuation of the property of small amount; but who should bear the loss—the innocent purchaser or the surviving spouse who has remained silent throughout the probate proceedings? The better view is that the spouse should bear the loss.

Richmond I. McKay

[32] 239 So. 2d 925 at 927 (Miss. 1970).

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